89-2004

Supreme Court, U.S.
FILED
JUN 22 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-_____

In The

Supreme Court of the United States

October Term, 1989

THOMAS F. KRANTZ

Petitioner,

vs.

THE STATE OF MONTANA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

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QUESTIONS PRESENTED

The Montana "weapon enhancement statute" authorizes a trial court to impose a term of imprisonment upon a convicted criminal defendant which exceeds the maximum term of imprisonment provided for the underlying crime by as much as ten years, if that defendant "knowingly displayed, brandished, or otherwise used" a firearm in the commission of the primary offense. Petitioner Krantz, convicted after a jury trial of two felonies, was sentenced to the full ten years additional incarceration available under the weapon enhancement statute for using a firearm in the commission of the felonies. Weapon usage was neither charged in the Information, nor was it an issue submitted to the jury for a factual determination beyond a reasonable doubt.

The questions presented are:

1. Did the imposition of a separate, consecutive ten-year sentence for use of a weapon during the commission of an underlying felony, violate Petitioner Krantz's Sixth Amendment rights to be informed of the nature and cause of the accusation against him, and to a trial by jury, where weapon usage was neither charged nor submitted to the jury for a factual determination?

2. May the State of Montana, consistent with the federal due process clause, treat its weapon enhancement statute as setting forth a "sentencing factor", rather than defining a crime, when the weapon enhancement statute formally articulates elements that appear to be like traditional elements of a crime, and substantively provides for an increased sentence well beyond the statutory maximum provided for the underlying offense?

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THOMAS F. KRANTZ
Petitioner,

vs.

THE STATE OF MONTANA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

The Petitioner, Thomas Krantz, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Montana Supreme Court entered in this proceeding on March 1, 1990, and from which rehearing was denied on March 27, 1990.

OPINIONS BELOW

The opinion of the Montana Supreme Court is reported at 788 P.2d 298 (Mont. 1990). The denial of the petition for rehearing was not reported. The opinion and denial of the petition for rehearing are reproduced in Appendices A and B.

JURISDICTION

The judgment of the Montana Supreme Court was

entered on March 1, 1990. A timely petition for rehearing was denied on March 27, 1990. This petition for certiorari is filed within ninety days of the denial of the petition for rehearing. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C.§ 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Statutes and constitutional provisions involved are:

The Sixth Amendment to the United States Constitution:

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution, which provides in pertinent part:

No State shall...deprive any person of life, liberty, or property, without due process of law...

Montana Code Annotated, Section 46-18-221, which provides:

Additional sentence for offenses committed with a dangerous weapon. (1) A person who has been found guilty of any offense and who, while engaged in the commission of the offense, knowingly displayed, brandished, or otherwise used a firearm, destructive device, as defined in 45-8-

332(1), or other dangerous weapon shall, in addition to the punishment provided for the commission of such offense, be sentenced to a term of imprisonment in the state prison of not less than 2 years or more than 10 years, except as provided in 46-18-222.

(2) A person convicted of a second or subsequent offense under this section shall, in addition to the punishment provided for the commission of the present offense, be sentenced to a term of imprisonment of not less than 4 years or more than 20 years, except as provided in 46-18-222. For the purposes of this subsection, the following persons shall be considered to have been convicted of a previous offense under this section:

(a) a person who has been convicted of an offense, committed on a different occasion than the present offense, under 18 U.S.C 924(c); and

(b) a person who has previously been convicted of an offense in this or another state committed on a different occasion than the present offense, during the commission of which he knowingly displayed, brandished, or otherwise used a firearm, destructive device, as defined in 45-8-332(1), or other dangerous weapon.

(3) The imposition or execution of the minimum sentences prescribed by this section may not be deferred or suspended, except as provided in 46-18-222.

(4) Any additional sentence prescribed by this section shall run consecutively to the sentence provided for the offense.

STATEMENT OF THE CASE

On September 9, 1987 Thomas Krantz was charged with three counts of robbery, one count of ac-

countability for robbery, and with criminal possession of dangerous drugs. He was not charged with weapon usage either separately or as part of any of the other charges. The Information recited the possible penalty for each offense charged. No mention was made in the charging document, however, of the two-to-ten year sentence provided for a violation of §46-18-221 MCA, Montana's weapon enhancement statute (hereinafter the weapon statute).

A jury trial was held during which the charge of criminal possession of dangerous drugs was dropped. Mr. Krantz was acquitted of two of the robbery counts and was convicted of one count of robbery and one count of accountability for robbery.[1] On November 13, 1987, he was sentenced to a term of thirty years on each of those counts, the terms to run concurrently. In addition, a separate sentence of ten years on each conviction was imposed for weapon usage. The two ten-year weapon usage sentences are concurrent with each other but, as required by statute, consecutive to the thirty year sentences on the underlying offenses.[2]

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[1]The robbery conviction involved a count alleging that Petitioner Krantz, in the course of committing a theft at a Missoula pizza business, purposely placed two of its employees in fear of immediate bodily injury. The accountability conviction involved a count alleging that Petitioner Krantz drove the getaway car in the robbery of a Missoula motel. *See*, Amended Information, Appendix E; Judgment, Appendix C.

[2]Judgment, Appendix C. Since one of the weapon usage sentences was imposed for the underlying felony of accountability (driving the getaway car), it appears that one of Petitioner's ten-year consecutive sentences for using a firearm in the commission of a crime was imposed for an offense in which he did not use, brandish, display or even possess a firearm. At least, the trial and sentencing transcripts are both devoid of any evidence that he did use a weapon in connection with his participation in the motel robbery, and the sentencing court did not find, even by implication, weapon usage on the accountability count. *See*, the complete transcript of the sentencing hearing, reproduced as Appendix D.

On appeal to the Montana Supreme Court, Mr. Krantz asserted that the weapon statute created a separate crime, or an element of an aggravated form of the underlying offense. He challenged the imposition of the additional ten year sentences on the basis that they were imposed in violation of his Sixth Amendment rights to be informed of the nature and cause of the accusation against him and to trial by jury. He relied on *McMillan v. Pennsylvania*, 477 U.S. 79 (1986); *Specht v. Patterson*, 386 U.S. 605 (1967); and *Mullaney v. Wilbur*, 421 U.S. 684 (1975) as authority for his position.

The Montana Supreme Court, in a 5-2 decision, held that Krantz' ten-year weapon usage sentence was valid, even though based on facts not pled, proved, or found by a jury, because the Montana weapon statute defined a "sentencing factor"[3] not a crime. Relying on certain language found in the *McMillan* opinion, the majority of the Montana Court declared that under the federal constitution, the decision whether to treat weapon usage as a separate crime, or as a "mere"[4] sentencing factor, was one expressly committed to the states and their respective legislative bodies. Noting that *McMillan* set out no "bright line" test[5] for distinguishing "crimes" from "sentencing considerations," the Montana Court held that the intent of the Legislature was determinative, and in the case of the Montana

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[3]The distinction between "sentencing factors" and "crimes" has been most elaborately made and explained by this Court in *McMillan*, 477 U.S. at 84-86; 89-90.

[4]The use of the word "mere" does not, of course, refer to the liberty consequences for a defendant subject to sentencing under the weapon statute, which may be (and in this case were) severe; rather, the reference is to the lenient standard of proof which is thought to pass constitutional muster at sentencing hearings. *See, McMillan*, 477 U.S. at 91-92.

[5]*McMillan*, 477 U.S. at 91.

weapon statute was clear: the statute was enacted by the Legislature as part of an omnibus sentencing bill, and was codified in that portion of the Montana Code Annotated related to criminal sentencing. Finding no evidence that the Legislature was attempting to redefine a traditional crime in order to lessen the State's burden of proof, the Court asserted that the intention of the Legislature that weapon usage be a sentencing consideration, standing alone, was sufficient to render it just that: a sentencing consideration, not a crime required to be pled and proved beyond a reasonable doubt.

In reaching this conclusion, the Court acknowledged that in *form*, the Montana weapon statute bore a close resemblance to statutes defining crimes: it set forth a prohibited act and a culpable mental state, had its own separate penalty provision, its own separate recidivist provision, and could itself be "enhanced" by other sentencing considerations.[6] The Court acknowledged, too, that the primary characteristic of the Pennsylvania statute found constitutional in *McMillan*—the fact that it did not authorize imposition of an additional sentence beyond the statutory maximum authorized for the underlying offense—was

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[6] For example, the amount of actual incarceration time to which a Montana defendant could be subjected under a weapon usage sentence would be doubled if a so-called "dangerous designation" was imposed on top of the weapon sentence. In Petitioner Krantz's case, this actually took place. Thus, the effect of the weapon usage "enhancement" —which ordinarily would delay the date of a Montana defendant's earliest parole eligibility by 2-1/2 years, less good time — when enhanced by the dangerous designation, is to delay the earliest date of parole eligibility by 5 years, less good time. Conservatively calculated, this adds approximately 36-40 months actual prison time served to the sentence for the underlying felony. Interestingly, under the Federal Sentencing Guidelines, weapon usage for this type of crime would normally lead to increased actual incarceration time of from 14-18 months for a criminal defendant with Petitioner Krantz's criminal history.

not a characteristic of the Montana statute, which not only authorizes but *requires* the weapon usage sentence to be added on to the sentence imposed for the underlying crime. In the opinion of the Court, however, these facts did not rise to a level of constitutional significance, and the Montana weapon statute was valid as applied—as supporting an additional penalty based on an uncharged act never submitted to the constitutionally-approved factfinder.

Two members of the seven-Justice Montana Court disagreed. Their argument in essence was that a statute formally bearing every earmark of a criminal offense must be treated as a criminal offense for due process purposes; hence, the proscribed acts on which additional punishment is based must be formally charged and proved beyond a reasonable doubt to the satisfaction of a jury. The dissenters took special note of the mental state requirement embodied in the Montana weapon statute, as well as of its mandatory sentencing provisions, under which a weapon usage sentence may not be suspended, and must be served consecutively to the sentence imposed for the underlying offense. Such characteristics, it was argued, ought clearly to be sufficient to invoke the elements of substantive due process articulated by this Court in *In Re Winship*, 397 U.S. 358 (1970).

REASONS FOR GRANTING THE WRIT

I. The Montana Supreme Court's determination that §46-18-221 MCA, the weapon enhancement statute, may be applied absent full due process protections, conflicts with the principles announced by this Court in *Specht v. Patterson*, *Mullaney v. Wilbur*, and *McMillan v. Pennsylvania*.

§46-18-221, MCA provides that a person who has been found guilty of any offense and who, while engaged in the commission of the offense, knowingly displayed, bran-

dished, or otherwise used a firearm, destructive device, or other dangerous weapon must, in addition to the punishment provided for the commission of that offense, be sentenced to a term of imprisonment in the state prison of not less than 2 years or more than 10 years. The additional sentence must run consecutively to the term imposed for the underlying offense and it may not be suspended.

This petition involves the question of whether the weapon statute must be treated as defining a separate crime, or an element of an aggravated version of the underlying crime, in which cases full due process protections are necessary; or, whether it may be treated as defining a sentencing factor, in which case only minimal due process protections are required. In deciding that it may be treated as the latter—a sentencing factor—the Montana Supreme Court, while relying heavily on an elaborate analysis of this Court's recent opinion in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), appears to have reached a result in conflict with *McMillan* and its predecessors.

This conflict is not immediately apparent from the Montana Court's opinion. In upholding the application of the weapon statute absent the procedures mandated by the Sixth Amendment for charging and proving crimes, the Montana Supreme Court relies on the general rule that the decision to designate specified factors as elements of a crime, as affirmative defenses, or as sentencing factors is a matter left to the states. It also relies on the fact that weapon usage is traditionally considered in the sentencing decision, and the fact that the elements of the crime of robbery in Montana have remained essentially the same since territorial times. Each of these is a subsidiary consideration mentioned by this Court in *McMillan* as supportive of its determination that the quite different Pennsylvania "weapon usage" statute, at issue there, was constitutionally applied.

It is true that a state legislature's definition of a crime or the elements of a crime is usually dispositive on the question of what has to be charged and proved in order legitimately to impose punishment on an individual. It is also true, however, that "there are constitutional limits beyond which the States may not go in this regard," *McMillan*, 477 U.S. at 85, quoting *Patterson v. New York*, 432 U.S. 197, 210 (1977). This Court has not yet defined precisely what those constitutional limits are. *McMillan*, 477 U.S. at 91. But it has consistently indicated that statutes, like Montana's weapon statute, that increase a sentence beyond the maximum for the underlying offense must be treated as defining a separate crime or an element of the underlying crime.

For example, *Specht v. Patterson*, 386 U.S. 605 (1967), considered a statute providing that defendants convicted of certain offenses could be sentenced to a separate term of from one day to life if the sentencing judge made additional factual determinations. The statute was found to be a new charge that led to new criminal punishment. Therefore, it could not be applied absent "all those safeguards which are fundamental rights and essential to a fair trial." *Specht*, 386 U.S. at 610.

Likewise, in *Mullaney v. Wilbur*, 421 U.S. 684 (1975), this Court held that the prosecution must prove, beyond a reasonable doubt, all of the facts of a more aggravated offense before the sentence for that offense, as opposed to the sentence for a lesser offense, could be imposed. It stated: "The safeguards of due process are not rendered unavailing simply because a determination may already have been reached that would stigmatize the defendant and might lead to a significant impairment of personal liberty." *Mullaney*, 421 U.S. at 698.

The most recent decision relevant to the issue presented here is, of course, *McMillan*. At issue there was a statute providing for the imposition of a mandatory

minimum sentence, *within* the term already authorized for the primary offense, if the sentencing judge found that a weapon had been used in the commission of that offense. That statute survived constitutional scrutiny because, unlike Montana's statute, it "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it..." *McMillan*, 477 U.S. at 87, 88. *Specht v. Patterson* and *Mullaney v. Wilbur* were distinguished because the statutes considered in those cases increased the possible terms of incarceration beyond what was available for the underlying offense.

In spite of the fact that *McMillan* specifically does not purport to set out a "bright line" test of constitutionality in this area, it is difficult to read the case without concluding that the determinative fact leading the Court to uphold the application of the Pennsylvania weapon statute was that it created or authorized no separate or additional penalty for the conduct it identified as culpable. In stigmatizing certain additional acts, the statute did not actually expand the scope of the defendant's potential loss of liberty beyond the sentence he might receive for the underlying crime. In that sense, the impairment of liberty authorized by the Pennsylvania weapon statute was truly "adverbial" to the main charge and thus properly a "sentencing consideration."

The *McMillan* Court was quite careful in limiting its holding of constitutionality in the Pennsylvania case strictly within the confines of its analysis of the salient characteristics of the Pennsylvania weapon statute. 477 U.S. at 87-88. Nonetheless, the Montana Supreme Court read *McMillan* with maximum expansiveness, as standing for the proposition that a state has virtually unfettered discretion in determining whether to treat a specified factor of conduct as an element of a crime or a sentencing factor, regardless of whether it increases the possible term of incarceration beyond what is available for the underlying

offense, and regardless of whether it creates a separate punishment. The Montana Court's reading of *McMillan*, interestingly radical in its assertion of states' rights, is jurisprudentially anomalous in ignoring the central factual underpinnings of the parent decision.

In its opinion here, the Montana Supreme Court also relied on *Patterson v. New York*, 432 U.S. 197 (1977) in upholding the application of the weapon statute as a "sentencing factor." That reliance seems misplaced. *Patterson* held that the prosecution does not have to bear the burden of proving the nonexistence of exculpatory or mitigating circumstances. It did not hold that the state need not charge and prove additional facts that lead to additional punishment.

Montana's treatment of its weapon statute appears to go beyond the constitutional limits that have thus far been identified in dealing with the question of what, for due process and Sixth Amendment purposes, defines a crime. It disregards the fact that this Court has always explicitly rejected sentencing provisions that did not require full due process protections as to all of the factors upon which liability for the maximum sentence could be based.

II. This case squarely presents the issue of how far a statute may constitutionally go, in form and effect, in criminalizing particular conduct, before it must be treated as defining a crime or an element of a crime.

A state criminal defendant has a constitutional right under the Fourteenth Amendment to a trial by jury in all those cases which, if tried in a federal court, would fall within the Sixth Amendment's protections. *Duncan v. Louisiana*, 391 U.S. 145 (1968). The due process clause protects a criminal defendant against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In*

Re Winship, 397 U.S. 358, 364 (1970). In addition, a criminal defendant may not be convicted on facts which were not charged, even if those facts would establish the offense if it had been charged: this rule is also based on the due process clause. *Dunn v. U.S.*, 442 U.S. 100, 106-107 (1979).

What these three propositions taken together mean is this: if particular conduct is criminalized, an individual may not suffer loss of liberty for engaging in that conduct unless he is formally charged with it, and the question of his engaging in it is submitted to a jury, for its determination beyond a reasonable doubt. What these uncontroversial constitutional propositions do not establish, however, is what constitutes criminalization of conduct sufficient to bring them into play.

Clearly, not all facts about an individual's conduct (or about an individual himself) which may have a bearing on the punishment he receives after conviction of a crime, are subject to the above requirements of pleading and proof. Many facts about both the commission of an offense and about the individual committing it are routinely considered by a sentencing court without formal pleading or submission to a jury. Similarly, many facts relating to possible mitigation or defense are not required to be pled or proved—or disproved—by the state beyond a reasonable doubt. *Patterson v New York*, 432 U.S. 197, 207 (1977).

Clearly also, the States are free to define for themselves the elements of particular crimes, as well as the crimes themselves, so long as that definition does not offend some deeply rooted principle of justice. An example of a definition of a crime which has been found to fit the latter category is a common-law felony lacking a mental or intent element. *U.S. v. U.S. Gypsum Co.*, 438 U.S. 422, 436-38 (1978).

The question which the present case most forcefully

and vividly presents is: what principles permit us to distinguish between those facts affecting punishment which comprise "crimes" (or elements thereof) for purposes of due process analysis, and all those other facts affecting punishment which are not elements of crimes but merely "sentencing considerations"?

This Court has in the past gone some of the way toward answering this question. In *Specht* it found that where the punishment *and* the facts establishing liability for it are both separate and independent of the charge on which the defendant was haled into court and convicted, a separate offense has in effect been created, which must be charged and proved to a jury. In *McMillan*, it found that where the punishment is not independent (i.e., where it falls within the maximum liability for the charged offense), and the fact establishing liability for it is quasi-independent (i.e., it is intimately involved in the actual commission of the offense but is not set forth as an "element" of that offense), the State is free to measure punishment with regard to the fact without pleading the fact or submitting it to the jury.

This case presents the Court with the opportunity—and the necessity—to take the next step in the analysis of this question. Here we have a separate and independent punishment depending upon a quasi-independent fact. What principles are available to determine whether, being of this character, the Montana weapon statute creates a crime for due process purposes?

The *McMillan* decision *can* be read as having already furnished the decisive principle: that where the *punishment* is separate and independent, though the fact is quasi-independent, we can conclude, without more, that a sepa-

rate crime has been created for due process purposes.[7] However, in *McMillan* itself, it is suggested that perhaps the dependent quality of the punishment component of the Pennsylvania statute, while dispositive of its validity, does not rise to a principle of decision in all such cases.[8] The Montana Supreme Court has adopted this latter reading of *McMillan* here, and accepted its implied invitation to ascertain just how far a State *can* go in stigmatizing and punishing certain conduct without "criminalizing" it for due process purposes.

The Montana Supreme Court found the dispositive point to be the intent of the Legislature. It found—in a state-law holding which concededly is not in question here—that the legislative intent was that the weapon statute be a "sentencing consideration," not an offense or an element of an offense. It thus concluded that the weapon statute did not create an offense, or an element of an offense. Legislative intent alone, however, clearly cannot furnish the principle of decision in such cases. If it did, neither *Specht* nor *Mullaney* could have arisen or been decided as they were, nor could *McMillan* have advanced the proposition—which it terms "obvious"—that there "are constitutional limits beyond which a State may not go in this regard."[9] For a State may clearly *intend* to go beyond those limits, whatever they may be. Thus, if intent were controlling, it would follow that no limits exist. But *McMillan* asserts that they do exist; hence, more than just a question of legislative intent must be involved.

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[7] This is, of course, the interpretation of *McMillan* advanced in part I of this argument, pp. 7-11 infra.

[8] *McMillan*, 477 U.S. at 88, 91.

[9] *McMillan*, 477 U.S. at 85.

The Montana Supreme Court also suggests that the fact that weapon usage has traditionally been considered by courts in sentencing persons convicted of crimes, lends support to its interpretation of the Montana weapon statute as a sentencing consideration. It should be pointed out, however, that in various circumstances, the possession and use of weapons have also traditionally constituted substantive crimes.[10] And it is also a fact that the very weapon statute after which the Montana version is apparently patterned, 18 U.S.C. §924(c), has uniformly been interpreted as creating a separate offense. So the analogy could just as well work the other way.

If neither the legislative intent, nor the traditional function, serve to properly characterize something like the Montana weapon statute for due process purposes, what can? That is the very challenging question presented by this case. How can we know a crime when we see one, as opposed to a "mere" sentencing consideration?

The only answer Petitioner can suggest is that suggested by the dissent in this case, as in *McMillan*. A statute defines a crime for due process purposes when it looks like and operates exactly like statutes defining crimes—when, in other words, it provides that "a specific component of a prohibited transaction shall give rise both to a special stigma and to a special punishment." *See McMillan*, 477 U.S. at 103 (Justice Stevens, dissenting). If a statute is indistinguishable in form and function from statutes which define crimes, then—irrespective of the intent of the legislature—it defines a crime, and the conduct it thereby prohibits and punishes must be charged and proved beyond a reasonable doubt to a jury. If this principle does not suffice for decision in this subject area, then it is incumbent upon this court now to articulate one which does.

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[10] E.g., in 18 U.S.C. 2113(d).

III. The decision of the Montana Supreme Court, if followed, creates a serious potential for the erosion of Sixth Amendment values.

It is a matter of common understanding that a crime is defined in terms of a prohibited act and a mental state. The weapon statute has both of these plus its own penalty provision and its own recidivist provision. These were the factors relied on by the federal circuit courts in determining that the federal weapon statute, 18 U.S.C. §924(c), which is similar to Montana's, creates a separate offense. *United States v Sudduth*, 457 F.2d 1198 (10th Cir. 1972). That interpretation of the federal weapon statute was specifically approved by this Court in *Simpson v. United States*, 435 U.S. 6, 10, (1978).[11]

As discussed previously, it is generally within the State's power to define crimes and elements of crimes. In some circumstances, however, full due process protections must be afforded regarding factors not formally identified as separate offenses or elements of offenses. *McMillan*, 477 U.S. at 91. The application of the weapon statute is such a circumstance. The weapon statute looks like and operates in exactly the same way as a separate offense.[12] A state should not be allowed to write a criminal

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[11] Likewise, in *Garrett v. United States*, 471 U.S. 773, 780-81 (1984) this Court determined that 21 U.S.C. 848 proscribing continuing criminal enterprises, constituted a distinct offense. The determinative factors were that the statute: 1) provided its own penalty, 2) had its own recidivist provision, and 3) referred to "one or more prior convictions...under this section"

[12] The weapon statute consists of the following elements:

1. The defendant must be guilty of an underlying felony; and
2. Having the mental state of knowingly;

statute and, simply by directing that it be placed with the sentencing provisions, absolve itself of the burden of charging and proving the act it wishes to punish. To do so would undermine the Sixth Amendment requirement that the defendant be informed of the nature and cause of the accusation against him and the right to a trial by jury.

The Sixth Amendment requirement that the defendant be informed of the nature and cause of the accusation against him is fundamental to our system of justice in that it provides the defendant with notice of what he must defend against and, consequently, the maximum punishment he faces. *Cole v. Arkansas*, 333 U.S. 196, 201 (1947). A defendant may not be sentenced for an uncharged, but arguably proved, offense. *Garner v. Louisiana*, 368 U.S. 157, 164 (1961). If the weapon statute is applied absent notice in the charging document this constitutional guarantee will be seriously undermined. There will be no limit to the sentence that might be imposed once basic criminality is established. A state could define criminal offenses in only the most basic terms and rely on enhancement statutes to obtain longer sentences for more aggravated

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> 3. He must have displayed, brandished, or otherwise used a firearm, destructive device or other dangerous weapon in the commission of the underlying felony.

A person found guilty of violating the statute must be sentenced to a separate, consecutive sentence of from two to ten years that may not be suspended. More severe penalties are provided for "second or subsequent offenses under this section."

Interestingly, an individual who has "previously been convicted of an offense...under 18 U.S. C. 924 (c)" is considered to have been "previously convicted under this section." Thus, the separate recidivist provision of Montana's weapon statute equates a "conviction" under the federal weapons statute—which has always been interpreted as defining a separate crime—with a conviction under the Montana statute.

offenses. It could thereby relieve itself of the burden of charging and proving aggravating factors.[13]

The Sixth Amendment right to a jury trial, and the concomitant due process requirement of proof beyond a reasonable doubt, recognize the importance of a person's liberty interest, prevent oppression by the government, and engender confidence in and respect for the criminal justice system. *In re Winship*, 397 U.S. 358 (1970); *Duncan v. Louisiana*, 391 U.S. 145 (1967). These guarantees are meaningful only if they apply to all facts upon which the maximum sentence could be based. Whether a weapon was used is a factual determination like any other factual determination the jury is called upon to make concerning the circumstances of the underlying offense. *United States v. Sudduth*, 457 F.2d 1198, 1201 (10th Cir. 1972). In Montana the consequences of that determination are more serious than a conviction for many felonies. It is therefore appropriate that full trial rights attach on the issue of weapon usage.

An examination of the effect of the weapon statute on a sentencing proceeding magnifies the need for full due

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[13]The Montana Supreme Court did hold that the charging document must contain notice that the weapon enhancement statute is at issue in a case. It found, however, that the failure to allege weapon usage in the charging document in this case was harmless because weapon usage was mentioned in the accompanying affidavit; and because there was evidence of weapon usage presented at trial.

This holding ignores the rule that the omission of a critical factor from the charging document is a fundamental error. *See e.g., DeJonge v. Oregon*, 299 U.S. 353, 362 (1936) ("Conviction on a charge not made would be a sheer denial of due process."); *White, Warden v. Levine*, 40 F. 2d 502, 503 (10th Cir. 1930); *United States v. Smith*, 553 F. 2d 1239 (10th Cir. 1977); *Hamling v. United States*, 418 U.S. 87 (1974); *United States v. Standard Brewery*, 251 U.S. 210, 220 (1920); *Russell v. United States*, 369 U.S. 749 (1962).

process protections on the issue of weapon usage. In a normal sentencing proceeding, the defendant has a diminished liberty interest in the period of time comprising the maximum possible sentence for the underlying offense. The sentencing court may consider any number of factors and has discretion to impose any sentence it deems appropriate, so long as the sentence does not exceed the maximum possible term. *United States v. Tucker*, 404 U.S. 443, 446 (1972); *In Re Grahm*, 138 U.S. 461 (1890). The defendant's liberty interest in time periods beyond the maximum sentence for the underlying offense remains intact.

When the weapon statute is brought into play, the defendant faces a radically different situation from a normal sentencing proceeding. If it is determined that a weapon was used in the commission of the underlying offense, a separate, consecutive sentence of from two to ten years must be imposed and may not be suspended.[14] Application of the weapon statute absent full due process protections is tantamount to holding that once basic criminality is established, a defendant's liberty interest has been diminished, not only for the time period comprising the maximum term of incarceration for the underlying offense, but also for the subsequent ten year period. Liberty interests have never been discounted so easily under our constitution.

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[14] A determination that the defendant has violated the weapon statute in addition to the underlying felony is likely to result in a more serious penalty than a determination that he is guilty of the underlying felony and another felony. In the latter situation, the defendant is likely to receive concurrent sentences, whereas if he is sentenced pursuant to the weapon enhancement statute, that sentence must be consecutive to the sentence for the underlying felony.

IV. There are conflicts in the lower courts regarding the treatment that must be afforded enhancement statutes that increase the possible term of incarceration.

The general rule is that any fact leading to additional punishment must be subjected to full trial procedures. *See, e.g., Meyers v. United States*, 116 F.2d 601 (5th Cir. 1941); *United States v. Moore*, 540 F.2d 1088 (D.C. Cir. 1976); *United States v. Alverez*, 735 F.2d 461 (11th Cir. 1984).[15] An exception to the general rule can be found in cases where an increased sentence has been imposed based on the defendant's status as an habitual offender. *See, e.g., United States v. Bowdach*, 561 F.2d 1160 (5th Cir. 1977); *United States v. Neary*, 552 F.2d 1184 (7th Cir.), cert. denied, 434 U.S. 864 (1977). There is, however, a fundamental difference between enhancement based on the defendant's status as an habitual offender and enhancement based on the facts of the underlying offense. This difference was aptly characterized in *Buckley v. Butler*, 825 F2d 895 (5th Cir. 1987):

> ...[recidivist statutes] do not relate to determining what the accused has done, but rather to what the state has *previously* determined that he has done. And that previous determination must have been a formal, *judicial* determination of *guilt*; and hence one as to which the full measure of constitutional protections was available. (emphasis in original)

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[15]Almost every jurisdiction in the United States has a specific statute regarding sentencing in cases where a weapon was used in the commission of an offense. Of the jurisdictions that provide for an additional term of incarceration for weapon usage during the commission of the underlying offense, Montana stands alone in allowing the imposition of the additional sentence absent full due process procedures on the question of weapon usage. *See*, Appendix F for a summary of the relevant state and federal statutes.

Thus, cases upholding habitual offender enhancement absent full trial procedures do not conflict with the position urged in this petition.

There are, however, a few cases that conflict with the general rule, where the imposition of an additional sentence based on the facts of the offense has been upheld in the absence of full due process procedures. *See, e.g., United States v. Darby*, 744 F.2d 1508 (11th Cir.), *cert. denied*, 471 U.S. 1100 (1984); *United States v. Towers*, 775 F.2d 184 (7th Cir. 1985). These decisions, when examined, are not well-reasoned. They customarily cite as authority cases that uphold habitual offender enhancement, without distinguishing between it and enhancement based on the facts of the offense. They also rely on the fact that in *Specht v. Patterson*, 386 U.S. 605 (1967), this Court listed some of the due process procedures necessary before an additional sentence can be imposed. That list did not include the right to an adequate charging document or proof beyond a reasonable doubt. What these cases fail to recognize, however, is that the rights listed in *Specht* address only the specific issues raised by the petitioner there, who did not specifically challenge the failure to charge the offense or the lack of a jury determination of the factual issues involved. Nonetheless, it was determined that the statute was a new charge that led to new criminal punishment and, therefore, the defendant was entitled to "all those safeguards which are fundamental rights and essential to a fair trial..." *Specht*, 386 U.S. at 610. It cannot be seriously contended that those rights do not include the right to be informed of the nature and cause of the accusation or the right to a jury trial.

There is also a serious conflict in the federal circuit courts regarding the proper interpretation of *McMillan v. Pennsylvania*. This conflict is exemplified by the recent decisions in *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir 1988), and *Field v. Sheriff of Wake County North Carolina*,

831 F.2d 530 (4th Cir. 1987). Arizona's death penalty statute was examined in *Adamson*. The aggravating circumstances set forth in the statute elevated the offense of murder to capital murder, and increased the possible penalty from life imprisonment to death. The principles set forth in *McMillan* led the Ninth Circuit to determine that the aggravating circumstances were elements of the crime of capital murder that required a jury determination.

Conversely, in *Field*, the imposition of additional punishment, absent full trial procedures, was upheld. The additional punishment was imposed for the infliction of serious bodily injury in the commission of the offense of driving while impaired. The Fourth Circuit, relying on *McMillan*, found that because the statutory elements of the underlying offense had not been changed, there was no constitutional violation.[16]

This confusion as to whether full trial procedures are required when a statute provides for an additional sentence, based upon the way in which the underlying offense was committed, can only be cured by a final determination by this Court.

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[16]The other authority relied on were, again, cases upholding enhanced sentences based on the defendant's status as an habitual offender.

CONCLUSION

For all of these reasons, a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

No. 88-129

IN THE SUPREME COURT
OF THE STATE OF MONTANA
1990

STATE OF MONTANA
Plaintiff and Respondent,

-vs-

THOMAS FREDERICK KRANTZ,
Defendant and Appellant.

APPEAL FROM: District Court of the
Fourth Judicial District,
In and for the County of Missoula,
The Honorable James Wheelis, Judge
presiding.

COUNSEL OF RECORD:

For Appellant:
William Boggs argued, Missoula, Montana
Wendy Holton argued, Helena, Montana

For Respondent:
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Helena, Montana
Patti Powell argued, Asst. Atty. General, Helena
Robert L. Deschamps, III, County Attorney;
Fred Van Valkenburg, Deputy, Missoula, Montana

Submitted: December 12, 1989
Decided: March 1, 1990

Chief Justice J. A. Turnage delivered the Opinion of the Court.

Thomas Krantz appeals his criminal conviction and sentence for robbery and accountability for robbery following a jury trial in the Fourth Judicial District Court, Missoula County. We affirm.

ISSUES

1. Did the District Court err in allowing repeated references to a series of similar crimes in the Missoula area after the State agreed at the omnibus hearing not to introduce other crimes evidence?

2. Did the District Court abuse its discretion by failing to provide adequate reasons to justify the sentence and the dangerous offender designation?

3. Did the District Court violate the appellant's due process rights in applying the weapon enhancement statute and the dangerous offender statute?

FACTS

Near midnight on May 24, 1987, a masked gunman using a rusted chrome or stainless steel pistol held up the Missoula Domino's Pizza. One week later at about 1:30 a.m. on June 2, an armed robber held up the Missoula Orange Street Inn. Near the Inn, responding sheriff's officers spotted a car matching the description of a vehicle seen at a prior robbery. The officers stopped the car and detained the passenger, Greg Jellison, and the driver, appellant Thomas Krantz. A search of the suspects and their car produced rolls of coins taken from the Orange Street Inn and a chrome-plated, .38 special handgun. Witnesses later identified the appellant as the Domino's Pizza robber.

Between May 19 and June 2, 1987, five other robberies following a common pattern had occurred in the Missoula area. In addition to Domino's Pizza and the

Orange Street Inn, Pickle-O'Pete's, the Snow King Restaurant, the Village II, the Campus Inn Motel, and the Executive Motor Inn were also robbed. The State charged Krantz with the Domino's Pizza, Pickle-O-Pete's, and the Snow King robberies and with accountability in the Orange Street Inn holdup.

At the pretrial omnibus hearing, the State agreed not to introduce other crimes evidence. Prior to trial, the State informed the District Court that it would elicit testimony concerning the series of robberies to help explain the actions of police officers and victims. The court held that the testimony did not fall within the definition of other-crimes evidence and, therefore, did not trigger the procedures set out in State v. Just (1979), 184 Mont. 262, 269, 602 P.2d 957, 961. During trial, witnesses and state prosecutors referred repeatedly to the series of robberies without defense objection. The court admonished the jury on several occasions about the limited purposes of such evidence.

The jury found the appellant guilty of accountability in the Orange Street Inn holdup and guilty of robbery in the Domino's Pizza holdup, but not guilty of the robbery of Pickle-O-Pete's and the Snow King Restaurant. The District Court sentenced the appellant to thirty years on each conviction and added ten years to each for use of a weapon. The court ordered the forty-year sentences to run concurrently and designated the appellant a dangerous offender. The defendant now appeals the conviction, sentence enhancement, and dangerous offender designation.

OTHER CRIMES EVIDENCE

The appellant contends that the State's references during trial to the series of Missoula robberies violated both the substantive and procedural requirements of Just. We decline to reach this issue because the appellant failed to object to the controverted evidence at any time before or during trial. Failure to object to alleged other crimes evidence precludes consideration of the issue on appeal.

State v. Warnick (1982), 202 Mont. 120, 125, 656 P.2d 190, 193.

The appellant cites State v. Brown (1984), 209 Mont. 502, 680 P.2d 582, for the proposition that the appellant's failure to object is not a defense when the omnibus order prohibited the introduction of other crimes evidence. Brown is distinguishable. In Brown, we held that the defendant's motion in limine to exclude evidence of prior acts and the trial court's order requiring ten days notice of such evidence were sufficient to preserve the issue for appeal. Brown, 209 Mont. at 506-07, 680 P.2d at 584-85. Here, the appellant at no time disapproved of the evidence or disagreed with the District Court's finding that it was not other crimes evidence. The record shows that the appellant declined the trial court's offer to instruct the jury on other crimes evidence. The objection requirement prevents the defendant from consciously planting errors in the trial proceedings and then raising those errors as grounds of appeal. State v. Stroud (1984), 210 Mont. 58, 73, 683 P.2d 459, 467. The appellant cannot now complain of prejudice from other crimes evidence when he did not discern any prejudice at trial.

SENTENCING COURT'S STATEMENT OF REASONS

The appellant argues that in sentencing the District Court failed to consider the presentence report and gave inadequate reasons for the sentence and the dangerous offender designation.

During sentencing the District Court stated,

> [Y]ou have . . . shown a consistent pattern of endangering other people. Therefore, on the basis of your record and the nature of these crimes, I sentence you on each of the two counts to thirty years in the Montana State Prison, ten extra consecutive to those on each of those two counts for the use of a weapon, and designate you a dangerous offender . . . .

The written judgment stated,

> A Pre-sentence Investigation Report was ordered and the Court having received and reviewed the report and being fully advised as to the facts of this case . . . .
>
> Reasons for the sentence are:
> 1. Defendant's criminal record;
> 2. Serious nature of offense: and
> 3. Consistent pattern of endangering other people.

The sentencing court is required by statute to state for the record its reasons when imposing sentence. Section 46-18-102(3)(b), MCA. This rule complies with basic fairness by acknowledging the defendant's right to be informed of the reasons for his sentence. It also facilitates review by this Court and the Sentence Review Board. State v. Petroff (Mont. 1988), 757 P.2d 759, 761, 45 St.Rep. 833, 835.

We have generally upheld minimal statements of sentencing reasons. In State v. Petroff we held that, "[t]he recommendations of the Pre-sentence Investigation [and] [t]he Defendant's prior criminal record" provided a sufficient statement. Petroff, 757 P.2d at 761, 45 St.Rep. at 835. In State v. Johnson, we upheld a sentence based on the "[d]efendant's history of alcohol and driving offenses" coupled with the presentence report. Johnson (1986), 221 Mont. 503, 518, 719 P.2d 1248, 1257.

We hold that the District Court's statement of reasons in this case is sufficient. Whether the sentence and dangerous offender status are supported by the presentence investigative report is a question more properly raised before the Sentence Review Division. See Rule 16, Rules of the Sentence Review Division of the Montana Supreme Court.

CONSTITUTIONALITY OF SENTENCE ENHANCEMENT

Standing

The State contests the appellant's standing to challenge the constitutionality of the procedure used to enhance his sentence for use of a weapon and to designate him a dangerous offender. To challenge the constitutionality of a criminal statute or procedure, the defendant must show a direct, personal injury resulting from application of the law in question. State v. Bruns (1984), 213 Mont. 372, 380-81, 691 P.2d 817, 822. The State argues that because the appellant's sentence, including enhancement, did not exceed the maximum possible sentences for robbery and accountability, the appellant suffered no injury.

We disagree with the State and hold that the appellant has standing to challenge both the weapon enhancement statute and the dangerous offender statute.[1] The appellant faces direct injury to his liberty interest. See State v. Nichols (1986), 222 Mont. 71, 78, 720 P.2d 1157, 1162. Under the weapon enhancement statute, he faces ten years in prison in addition to thirty years for the underlying crimes. See § 46-18-221(1), MCA. Under the dangerous offender statute, he will spend up to ten extra years in prison prior to parole eligibility. See § 46-23-201(2), MCA.

Separate Crimes and Elements

The appellant argues that under several United

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[1] The State's argument that the appellant gains standing only if his sentence exceeds the maximum potential sentence allowed for the substantive crime, depends on the appellant's contention that his right to due process was violated when the trial court enhanced his sentence beyond that limit without the full panoply of due process procedures. Since we do not accept enhancement beyond the maximum for the underlying crime as establishing a threshold of due process violation, it also does not establish a threshold for injury and, thereby, standing.

States Supreme Court decisions the Montana statute proscribing use of a weapon in the commission of a crime, § 46-18-221, MCA, and the statute restricting parole eligibility, § 46-18-404 MCA, are distinct crimes separate from the underlying offense or are elements of the underlying offense. As such, the prosecution must charge use of a weapon and dangerous offender status in the information or indictment, they are questions of fact for the jury, and they must be proven beyond a reasonable doubt. The appellant asserts that because the State failed to meet any of these criteria, his enhanced sentence violated the United States constitutional guarantee of trial by jury under the Sixth Amendment and guarantee of due process under the Fourteenth Amendment.

In Specht v. Patterson (1967), 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326, the Supreme Court addressed the due process ramifications of using sentence-enhancement factors in place of elements of a crime. The State of Colorado convicted Specht of indecent liberties under a statute which carried a maximum penalty of ten years, but sentenced him without further notice or hearing under Colorado's Sex Offenders Act. The Act provided that after reviewing the defendant's psychiatric evaluation the trial court would determine if the defendant was a threat of bodily harm to the public, a habitual offender, or mentally ill. If the court so found, the defendant could be incarcerated for an indeterminate term of one day to life. Specht, 386 U.S. at 607-08, 87 S.Ct. at 1211, 18 L.Ed.2d at 328-29. The Court reversed the sentence holding that because the sentencing procedure required determination of new factual issues under a discrete statute, due process entitled the defendant to full trial procedures on those issues. Specht, 386 U.S. at 609-10, 87 S.Ct. at 1212, 18 L.Ed.2d at 330.

In the case of In re Winship (1970), 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368, the Supreme Court considered the constitutionality of incarcerating a juvenile for larceny under the New York Family Court Act. The Act required that facts of juvenile misbehavior be determined only by a

preponderance of the evidence. Winship, 397 U.S. at 360, 90 S.Ct. at 1070, 25 L.Ed.2d at 373. After recounting the history and policy behind the reasonable doubt standard, the Court reversed the case stating,

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

Winship, 397 U.S. at 364, 90 S.Ct. at 1073, 25 L.Ed.2d at 375.

In Mullaney v. Wilbur (1975), 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508, the Supreme Court applied its statement in Winship. Under Maine law proof of an intentional and unlawful homicide raised a conclusive presumption of malice aforethought and, therefore, murder. If, however, the defendant proved by a fair preponderance of the evidence that he committed the homicide in the heat of passion on sudden provocation, the homicide would be reduced to manslaughter. Mullaney, 421 U.S. at 691-92, 95 S.Ct. at 1886, 44 L.Ed.2d at 515. The Supreme Court held that under the principles established in Winship, absence of the heat of passion on sudden provocation was a factual element of murder which the prosecution must prove beyond a reasonable doubt. Mullaney, 421 U.S. at 704, 95 S.Ct. at 1892, 44 L.Ed.2d at 522. The Court noted its principal concern that if it allowed states unfettered discretion to define the elements of a crime,

> a State could undermine many of the interests [In re Winship] sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment.

Mullaney, 421 U.S. at 698, 95 S.Ct. at 1889, 44 L.Ed.2d at 519.

In two recent cases, the Supreme Court limited the broad ramifications of Specht, Winship, and Mullaney to give the states greater latitude in defining the elements of a crime and factors mitigating and aggravating sentencing. In Patterson v. New York (1977), 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281, the Supreme Court upheld New York's murder statutes which reduced murder to manslaughter, if the defendant proved by a preponderance of the evidence the affirmative defense of acting under the influence of extreme emotional disturbance. Patterson, 432 U.S. at 205, 97 S.Ct. at 2324, 53 L.Ed.2d at 289. Apparently recognizing the near impossible burden created by Mullaney, the Court stated that it is not necessary that

> a State must prove beyond a reasonable doubt every fact, the existence or nonexistence of which it is willing to recognize as an exculpatory or mitigating circumstance affecting the degree of culpability or the severity of punishment.

Patterson, 432 U.S. at 207, 97 S.Ct. at 2325, 53 L.Ed.2d at 290.

In its most recent decision on the subject, McMillan v. Pennsylvania (1986), 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67, the Supreme Court considered whether the Pennsylvania Mandatory Minimum Sentencing Act withstood due process scrutiny under the Specht-Mullaney-Patterson line of decisions. The Act required the sentencing court to impose at least a five-year minimum sentence for the underlying crime if the court found by a preponderance of the evidence that the defendant had visible possession of a firearm while committing a crime. The Court distinguished Specht and Mullaney in holding that under Patterson, the Pennsylvania Act did not violate due process.

McMillan, 477 U.S. at 91, 106 S.Ct. at 2419, 91 L.Ed.2d at 79.

The appellant argues that the present case is controlled by Specht, Winship, and Mullaney. Under these decisions, due process requires that whenever a factual determination could lead to punishment beyond the maximum provided for the underlying crime, that issue must be treated as a separate crime or as an element of a crime. The defendant would be entitled to notice, a hearing, an opportunity to present evidence and confront witnesses, and a requirement that a jury find the fact beyond a reasonable doubt —in other words, a trial on the issue. In the present case, the appellant would be entitled to have the issues of weapon usage and dangerous offender status included as issues during the robbery and accountability trial instead of considered by the court during sentencing.

The appellant distinguishes Patterson and McMillan because the statutes at issue in those cases did not increase the maximum sentence possible for the underlying crime. Like the present appellant, the Specht and Mullaney defendants faced sentences in addition to those imposed for the underlying crimes based on determinations of new issues of fact. In the appellant's interpretation, these cases teach that once all facts which would allow a maximum sentence have been proved beyond a reasonable doubt, other factors which increase or decrease the sentence within the maximum may be considered without full due process procedures. They may be affirmative defenses to be proved by the defendant, or they may be sentencing factors to be applied by the court. On the other hand, factors which would increase the sentence beyond the maximum for the underlying crime are separate crimes or elements of a crime subject to full trial procedures.

We do not believe that the Supreme Court intended such a narrow interpretation. The message of Patterson and McMillan is that the decision to designate specified factors as elements of a crime, as affirmative defenses, or as sentencing factors, is fundamentally a decision left to the states. In McMillan the Court restated the basic

premise of Patterson:

> It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion, and its decisions in this regard is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.

McMillan, 477 U.S. at 85, 106 S.Ct. at 2415-16, 91 L.Ed.2d at 76 (quoting Patterson, 432 U.S. at 201-02, 97 S.Ct. at 2322, 53 L.Ed.2d at 286-87). (Citations and quotations omitted.) The McMillan Court emphasized that, while due process imposes some limits beyond which the states may not go, application of the reasonable doubt standard has always depended on how state legislatures choose to define a crime. McMillan, 477 U.S. at 85, 106 S.Ct. at 2415, 91 L.Ed.2d at 75.

We do not believe that the system established by the Montana legislature goes beyond the permissible limits. The Supreme Court refused to establish any "bright line" test of those limits, McMillan, 477 U.S. at 86, 106 S.Ct. at 2416, 91 L.Ed.2d at 76, and we decline the appellant's invitation to establish one based on the maximum sentence of the substantive crime. The Court's primary concern in this series of cases is that states would circumvent due process by redefining the essential elements of guilt as affirmative defenses or as sentencing factors.

Montana's weapon enhancement statute and dan-

gerous offender statute do neither. The 1977 Montana Legislature adopted the weapon enhancement statute as part of a bill intended to limit the discretion of sentencing courts by establishing guidelines and minimum mandatory sentences for potentially violent crimes. Consideration of H.B. 261 Before the Senate Judiciary Comm. 45th Leg. (1977) (statement of Rep. Ramirez). Like the Pennsylvania statute challenged in McMillan, the Montana statute simply takes one factor traditionally used in sentencing, the use of a weapon during a crime, and dictates the minimum weight the court must assign. See McMillan, 477 U.S. at 89-90, 106 S.Ct. at 2418, 91 L.Ed.2d at 78-79. Similarly, the 1977 Legislature intended the dangerous offender statute to restrict the discretion of the parole board by limiting the parole eligibility of violent and repeat offenders. Consideration of H.B. 385 Before the House Judiciary Comm. 45th Leg. (1977) (statements of Sen. Thomas and Hank Burgess, Bd. of Pardons). The statute takes a traditional factor in determining parole eligibility, the danger to society, and dictates the precise weight to be assigned. Furthermore, in bills establishing both statutes, the Legislature directed that they be codified in the Revised Codes of Montana at Title 95, Montana Code of Criminal Procedure, Chapter 22, Sentence and Judgment. Act approved April 8, 1977, ch. 340, § 1, 1977 Mont. Laws 1050; Act approved May 13, 1977, ch. 584, § 13, 1977 Mont. Laws 1958, 1964. At that time substantive criminal statutes were codified in Title 94, Crimes and Criminal Procedure, Chapters 1 through 46. The elements of the underlying crime in this case, robbery, have remained essentially the same since territorial times. Compare § 45-5-401, MCA (1989) with Laws of Mont. Ch. VI, § 71 (1879).

The Montana weapon enhancement statute contains a number of elements similar to those found in substantive criminal statutes, but those elements do not make it a separate crime. The enhancement statute contains a recidivist provision, requires a mental state of knowingly, and may require a finding of fact, use of a weapon, not necessary to establish guilt of the underlying crime. The

recidivist provision carries out the statute's purpose by limiting the sentencing court's discretion in imposing increased punishment for repeat offenders. The mens rea requirement protects the defendant by imposing on the court an additional and appropriate finding in determining weapon usage. All sentencing factors may, and often do, require the court to consider facts not established during trial. These elements are as much pertinent and necessary attributes of traditional sentencing considerations as they are attributes of substantive crimes.

The appellant cites cases of the United States Supreme Court and the Circuit Courts of Appeals which have held that the federal weapon enhancement statute and other enhancement-type statutes are separate crimes.[2] The State counters that those cases are based on statutory construction and not due process considerations. The State cites numerous cases in which the federal courts held that enhancement statutes, even when they impose penalties beyond the maximum allowed for the substantive crime, did not create separate crimes and did not violate

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[2] United States v. Sudduth (10th Cir. 1972), 457 F.2d 1198, 1201 (holding that, although Congressional intent was ambiguous, 18 U.S.C. § 924(c), proscribing use of a weapon during a felony, creates a distinct crime and, therefore, could not be used to enhance a sentence after a substantive charge of weapon usage had been dropped); accord Simpson v. United States (1978), 435 U.S. 6, 10, 98 S.Ct. 909, 911-12, 55 L.Ed.2d 70, 75 (holding that the federal weapon statute cannot be used to increase punishment under the federal bank robbery statute which includes a weapon enhancement provision); see also Garrett v. United states (1985), 471 U.S. 773, 786, 105 S.Ct. 2407, 2415, 85 L.Ed.2d 764, 776 (holding that in passing 21 U.S.C. § 848, proscribing continuing criminal enterprises, Congress intended to create a distinct crime).

due process.[3]

While both arguments are persuasive, we do not find either convincing. To paraphrase McMillan, the fact that Montana and the federal government have formulated different statutory schemes to punish armed felons is merely a reflection of our federal system, which demands tolerance for a spectrum of state and federal procedures dealing with a common problem of law enforcement. See McMillan, 477 U.S. at 90, 106 S.Ct. at 2418, 91 L.Ed.2d at 79.

This Court has repeatedly held that Montana's weapon enhancement statute does not create a separate crime or element of a crime. State v. Forsyth (Mont. 1988), 761 P.2d 363, 384, 45 St.Rep. 1577, 1602; State v. Spurlock (1987), 225 Mont. 238, 241, 731 P.2d 1315, 1317; State v. Davison (1980), 188 Mont. 432, 445, 614 P.2d 489, 497. We reaffirm those decisions. The Montana legislature has chosen a scheme which makes dangerous offender status and use of a weapon sentencing factors. So long as that scheme remains constitutional, it is not the province of this Court to transmute these statutory factors into separate crimes or elements of crimes.[4]

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[3] See e.g. United States v. Inendino (7th Cir.), 604 F.2d 458, 463 (18 U.S.C. § 3575, dangerous special offender statute), cert. den. 444 U.S. 932, 100 S.Ct. 276, 62 L.Ed.2d 190 (1979); United States v. Darby (11th Cir. 1984), 744 F.2d 1508, 1538 (21 U.S.C. j § 849, dangerous special drug offender statute) cert. den. sub nom. Yamanis v. United States, 471 U.S. 1100, 105 S.Ct. 2322, 85 L.Ed.2d 841 (1985); United States v. West (9th Cir. 1987), 826 F.2d 909, 911 (18 U.S.C. § 1202(a), armed career criminal statute).

[4] The appellant also argues that the Montana weapon enhancement statute creates an aggravated version of robbery and the aggravating element, use of a weapon, must be pled and proved. Having concluded that use of a weapon is a sentencing factor and not an element of a crime, we do not find it necessary to address this argument further.

Due Process in Sentencing

The appellant argues that even if the weapon enhancement and dangerous offender designation are not separate crimes, application of those statutes still violate the Fourteenth Amendment because the prosecution failed to give adequate notice by stating in the charging document its intention to seek an enhanced sentence and dangerous offender designation.

Montana recognizes that due process applies to sentencing, but the defendant's liberty interest during sentencing is less than that interest during trial. State v. Nichols (1986), 222 Mont. 71, 76, 720 P.2d 1157, 1161. The process that is due, therefore, is not necessarily as great as that required by the substantive criminal charges. The defendant is entitled to reasonable notice and an opportunity to be heard during sentencing. Oyler v. Boles (1962), 368 U.S. 448, 452, 82 S. Ct. 501, 504, 7 L.Ed.2d 446, 450.

Notice of the sentencing hearing itself provides sufficient notice of potential dangerous offender designation because the statute requires the sentencing court to consider the issue. Nichols, 222 Mont. at 78, 720 P.2d at 1162. As a practical matter, the criminal defendant is always on notice. The State's failure to give more notice in this case did not violate the appellant's due process rights.

Because enhancement of a sentence for the use of a weapon is not an issue in every case, due process requires the State to provide some notice in the charging document. Forsyth, 761 P.2d at 384, 45 St. Rep. at 1602, if the issue is not inherent in the definition of the substantive charges. Davison, 188 Mont. at 446, 614 P.2d at 497. The charge of robbery does not necessarily entail use of a weapon. See § 45-5-401, MCA. The State's failure to allege use of a weapon in the charging document, therefore, was error.

The error, however, was harmless. The State alleged use of a weapon in its affidavit and motion for leave to file information. Furthermore, the record indicates that the

prosecution repeatedly elicited testimony that the appellant and his accomplice used a handgun during the robberies and the weapon enhancement statute requires the sentencing court to impose an additional minimum sentence when a weapon is used. The appellant had actual notice that use of a weapon would be a consideration during sentencing. See State v. Madera (1983), 206 Mont. 140, 152, 670 P.2d 552, 558.

We conclude that the sentence imposed by the trial court did not violate the appellant's right to due process.

Affirmed.

JA Turnage
Chief Justice

We concur:

John C. Harrison

Diane G. Barz

Fred Weber

RC McDonough

Justices

Justice John C. Sheehy, concurring and dissenting:

A general definition of crime is a union of act and mental state banned by the law. In Montana, mental state is found in the use of the adverbs "knowingly" and "purposely." However, the legislature may define an act as a crime without requiring mental state. When that is done, the banned act is one that brings on absolute liability. The Montana statute states:

> 45-2-104. Absolute liability. A person may be guilty of an offense without having, as to each

element thereof, one of the mental states described in subsection (33) [knowingly], (37) [negligently], and (58) [purposely] of 45-2-101 only if the offense is punishable by a fine not exceeding $500 or the statute defining the offense clearly indicates a legislative purpose to impose absolute liability for the conduct described. (Emphasis added.)

In this case, the penalty for using a gun imposes a jail term. The question whether the legislature intended to impose absolute liability for the use of a gun in committing a felony must be found in the statute defining the gun penalty. It must clearly indicate a legislative purpose to impose absolute liability for the conduct described.

It cannot be found in this case that the legislature intended to impose absolute liability for the use of a gun in committing a felony because it interposed the mental state word "knowingly" in its definition of the act. The statute states:

46-18-221. Additional sentence for offenses committed with a dangerous weapon. (1) A person who has been found guilty of any offense and who, while engaged in the commission of the offense, knowingly displayed, brandished, or otherwise used a firearm . . . or other dangerous weapon shall, in addition to the punishment provided for the commission of such offense, be sentenced to a term of imprisonment in the state prison of not less than 2 years nor more than 10 years . . .

. . .

(4) An additional sentence prescribed by this section shall run consecutively to the sentence provided for the offense. (Emphasis added.)

In this case, who found that Krantz acted "know-

ingly" in using a firearm to commit a felony? Certainly the jury did not, because the use of a firearm was not alleged in the charging information, nor was it contained in the instructions of the court. The court itself, at the time of sentencing, made no reference to whether Krantz acted "knowingly" in brandishing the firearm.

The crime of robbery in Montana can be proved by the state without a showing that a dangerous weapon was used. The statute provides:

> 45-5-401. Robbery. (l) A person commits the offense of robbery if in the course of committing a theft he:
>
> (a) inflicts bodily injury upon another;
>
> (b) threatens to inflict bodily injury upon any person or purposely or knowingly puts any person in fear of immediate bodily injury; or
>
> (c) commits or threatens immediately to commit any felony other than theft.

The penalty for committing the offense of robbery is a state prison term of not less than two years nor more than 40 years and a fine of not more than $50,000. Section 45-5-401, MCA.

Thus, the use of a dangerous weapon in the commission of a robbery is an aggravating factor, for which an additional penalty may be imposed under § 46-18-221, MCA.

In Jordan v. U.S. Circuit Court for the District of Columbia (D.C. Cir. 1956), 233 F.2d 362, 367 (vacated on other grounds 352 U.S. 904 (1956)) where defendant had been convicted of assault with intent to commit robbery and was given an additional five year term of imprisonment under a statute allowing such where the crime was committed with a pistol or firearm, the court vacated the additional sentence stating:

> . . . where the aggravation arises from the manner which the crime was committed, in substance a different aspect of the offense is sought to be punished. Accordingly, we think . . . that the facts in aggravation must be charged in the indictment and found to be true by the jury.

If the legislature had merely provided that the use of a gun in the commission of a felony would automatically lead to the increased penalty, there would be no problem here. However, the legislature inserted the word "knowingly," as an element in the use of the gun. This element requires a fact-finding, and a factfinding can only be done in criminal cases by a jury. In effect, the use of a gun is a separate offense, for which every element must be proved beyond a reasonable doubt. In Re Winship (1970), 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368. Because of the insertion of the word "knowingly," we should in effect overrule State v. Madera (1983), 206 Mont. 140, 670 P.2d 552; State v. Davidson (1980), 188 Mont. 432, 614 P.2d 489; and not regard the holding by the Court of Appeals for the Ninth Circuit in LaMere v. Risley (9th Cir. 1987), 827 F.2d 622.

There is an additional factor why we should require fact-finding by the jury with respect to the use of a firearm. There is a recidivist provision in § 46-18-221, MCA, as follows:

> (2) A person convicted of a second or subsequent offense under this section shall, in addition to the punishment provided for the commission of the present offense, be sentenced to a term of imprisonment in the state prison of not less than 4 years or more than 20 years, except as provided in 46-18-222. For the purpose of this subsection, the follow-

ing persons shall be considered to have been convicted of a previous offense under this section:

(a) a person who has previously been convicted of an offense, committed on a different occasion than the present offense, under 18 U.S.C. 924(c); and

(b) a person who has previously been convicted of an offense in this or another state, committed on a different occasion than the present offense, during the commission of which he knowingly displayed, brandished, or otherwise used a firearm, destructive device, as defined in 45-8-332(1), or other dangerous weapon.

(3) The imposition or execution of the minimum sentence prescribed by this section may not be deferred or suspended, except as provided in 46-18-222.

(4) An additional sentence prescribed by this section shall run consecutively to the sentence provided for the offense.

The following factors, therefore, should require us to find that gun-toting in the commission of a crime is a separate issue or offense which must be charged in the information and found by the jury:

(1) The forbidden act of brandishing a firearm.

(2) The forbidden act done knowingly.

(3) The punishment being separate and mandatory.

(4) Additional penalties for recidivism.

I would, therefore, affirm the conviction of Krantz for the felony offense but reverse the enhancement of his sentence that relates to the use of a firearm for the reason that the separate offense was not separately charged and found by the jury. There are Due Process and Sixth Amendment implications here not met in our statute.

John C. Sheehy
Justice

Justice William E. Hunt, Sr., concurring and dissenting

I concur with Justice Sheehy.

William E. Hunt
Justice

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF MONTANA

NO. 88-129

STATE OF MONTANA)
Plaintiff and Respondent,)
-vs-)
)
THOMAS FREDERICK KRANTZ,)
Defendant and Appellant)

The petition for rehearing is denied.

DATED this 27th day of March, 1990

JA Turnage
Chief Justice

JC Harrison

Diane Barz

Fred Weber

RC McDonough
Justices

Justice John C. Sheehy and Justice William E. Hunt, Sr. would grant a rehearing.

APPENDIX C

James B. Wheelis, District Judge
Department No. 1
Fourth Judicial District
Missoula County Courthouse
Missoula, MT 59801
(406) 543-7612

MONTANA FOURTH JUDICIAL DISTRICT COURT,
MISSOULA COUNTY

STATE OF MONTANA,	*	
Plaintiff,	*	
-vs-	*	JUDGMENT
THOMAS FREDERICK KRANTZ,	*	
Defendant.	*	

* *

The above-entitled cause came on regularly before the Court upon the application of Karen S. Townsend, Deputy County Attorney of Missoula County, State of Montana, for Leave to File an Information accusing the Defendant of the crimes of Count I: ACCOUNTABILITY FOR ROBBERY, a Felony, as specified in Section 45-5-401 and 45-2-301, M.C.A.; Count II: CRIMINAL POSSESSION DANGEROUS DRUGS, a Felony, as specified in Section 45-9-102, M.C.A.; Count III, IV and V: ROBBERY, a felony, as specified in Section 45-5-401, M.C.A.

Whereupon leave to file the Information having been granted and the Defendant being informed of all of his legal rights, he was duly arraigned, answered to his true name and the reading of the Information was waived.

The Defendant was represented by counsel, Bernie Goldman, at all stages of these proceedings.

On the 10th day of July, 1987, the Defendant entered a plea of Not Guilty to all five counts.

Thereafter an Amended Information was filed accusing the Defendant of the crimes of Count I: ACCOUNTABILITY FOR ROBBERY, a Felony, as specified in Section 45-5-401 and 45-2-301, M.C.A.; Count II: CRIMINAL POSSESSION DANGEROUS DRUGS, a Felony, as specified in Section 45-9-102, M.C.A.; Count III, IV and V: ROBBERY, a felony, as specified in Section 45-5-401, M.C.A.

Thereafter on the 13th day of October, 1987, a trial was held wherein the Defendant was found GUILTY of Count I: ACCOUNTABILITY FOR ROBBERY, a Felony; NOT GUILTY of Count III: ROBBERY, a Felony, GUILTY of Count IV: ROBBERY, a Felony; and NOT GUILTY of Count V: ROBBERY, a Felony. During the course of the trial, the Defendant made a motion to dismiss Count II: CRIMINAL POSSESSION DANGEROUS DRUGS, a Felony, which was unopposed by the State.

IT IS ADJUDGED AND DECREED that the Defendant is guilty of the offenses charged in counts I and IV.

A Pre-sentence Investigation Report was ordered and the Court having received and reviewed the report and being fully advised as to the facts of this case;

IT IS THE JUDGMENT OF THE COURT THAT THOMAS FREDERICK KRANTZ be AND THOMAS FREDERICK KRANTZ is hereby sentenced to a term of thirty (30) years in the Montana State Prison on each count. Additionally, for the use of a weapon during the commission of these offenses, the Defendant is sentenced to an additional ten (10) years in the Montana State Prison on each count. Said thirty (30) year sentence shall run consecutive with the ten (10) year sentence, for a total of forty (40) years in

the Montana State Prison. Said sentences on each count are to run concurrent with each other.

IT IS FURTHER ORDERED that the Defendant shall pay a fee through the Clerk of the District Court in the amount of Forty Dollars ($40.00), according to a schedule as set by his Probation Officer to go to the County Attorney Surcharge Fund as provided in Section 46-18-236, M.C.A.

Reasons for sentence are:

1. Defendant's criminal record;
2. Serious nature of offense; and
3. Consistent pattern of endangering other people.

Defendant shall be designated a dangerous offender for the purposes of parole.

Defendant shall receive credit for time served at Missoula County Jail, Missoula, in the amount of 165 days.

The Defendant is remanded to the custody of the Missoula County Sheriff for transportation to Montana State Prison in Deer Lodge, Montana, for execution of this sentence and Judgment.

Any bail posted is hereby exonerated.

Done in open Court this 13th day of November, 1987.

DATED this 22nd day of November, 1987.

James B. Wheelis
District Judge

APPENDIX D
TRANSCRIPT OF SENTENCING HEARING

FRIDAY, NOVEMBER 13, 1988

(W h e r e u p o n, the following proceedings were had and entered of record:)

THE COURT: State of Montana v. Thomas Frederick Krantz, the record should reflect the presence of Mr. Krantz with that of Mr. Goldman. Any reason we shouldn't proceed to sentencing?

MR. GOLDMAN: No, Your Honor.

THE COURT: Any corrections to the Pre-Sentence?

MR. GOLDMAN: None

THE COURT: The State's recommendation?

MS. TOWNSEND: Your Honor, I have had an opportunity to review the Pre-Sentence Report prepared by Mr. Gemignani and discussed this matter with Mr. Van Valkenburg. We will recommend, based on the Defendant's conviction for accountability for robbery and a robbery count, plus his previous record and concealed weapon's count, that you sentence him to twenty years on each of the two counts; that you impose an additional ten years for the use of a dangerous weapon on the robbery count; and that you ask that the dangerous weapon sentence run consecutively to the twenty years, but on each count those can run concurrently.

We would ask the Court based on his record and the seriousness of these offenses, that he be classified a

dangerous offender.

MR. GOLDMAN: Your Honor, I have reviewed the report of Mr. Gemignani. He did a fine job in writing. He did a thorough job. Mr. Gemignani recommends ten on each count to run concurrent and ten for the weapon.

But, if we take a look at his record, it is a misdemeanor record. This is his first felony. It is a serious crime there is no question about it, but I believe he can be rehabilitated. He is almost finished with part of his college education.

I would ask the Court at the max to follow Mr. Gemignani's recommendation, but I would ask the Court for a total of ten years dangerous.

That's all I have, Your Honor.

THE COURT: Anything more?

MR. GOLDMAN: Mr. Krantz has something to say to the Court.

MR. KRANTZ: I have a letter that I wrote to you, but if you want, I will just read it.

THE COURT: I will just read it right now.

Thank you.

Okay, I have read it. Anything more? Do you have anything more to say?

MR. KRANTZ: Only that I throw myself at your mercy, Your Honor. I'm not a bad person, and I have never got in trouble, nothing serious like this, and I don't ever plan on doing it again. I'm ashamed. I wish I could change things, but I can't.

THE COURT: My reaction to that is you may well be all of those things, but you have also shown a consistent pattern of endangering other people.

Therefore, on the basis of your record and the nature of these crimes, I sentence you on each of the two counts to thirty years in the Montana State Prison, ten extra consecutive to those on each of those two counts for the use of a weapon, and designate you a dangerous offender, and remand you to the custody of sheriff for transportation to Deer Lodge, with credit for time served.

MR. GOLDMAN: Pardon?

THE COURT: That's thirty years for each count concurrent and ten extra for the use of a weapon. The total is forty dangerous.

(End of proceedings.)

APPENDIX E

Karen S. Townsend
Deputy County Attorney
ROBERT L. DESCHAMPS III
Missoula County Attorney
County Courthouse
Missoula, MT 59802
Telephone - 721-5700 ext. 246
Attorneys for Plaintiff

MONTANA FOURTH JUDICIAL DISTRICT COURT,
MISSOULA COUNTY

STATE OF MONTANA, Plaintiff,	*	Cause No. 7891
-vs-	*	AMENDED
THOMAS FREDERICK KRANTZ, Defendant.	*	INFORMATION

* *

Karen S. Townsend, Deputy County Attorney of Missoula County, Montana, deposes and says that on or about and between May 21, 1987, and June 2, 1987, at Missoula County, Montana the above-named Defendant committed the offenses of Count I: ACCOUNTABILITY FOR ROBBERY, a Felony, as specified in Section 45-5-401 and 45-2-301, MCA, punishable by at least two and not more than forty years Montana State Prison and/or $50,000 fine; Count II: CRIMINAL POSSESSION DANGEROUS DRUGS, a Felony, as specified in Section 45-9-102, MCA, punishable by five years Montana State Prison and/or

$50,000 fine; and Count III, IV, and V: ROBBERY, a Felony, as specified in Section 45-5-401, MCA, punishable by at least two and not more than forty years Montana State Prison and/or $50,000 fine.

The facts constituting the offense are:

Count 1: On or about June 2, 1987, the above-named Defendant, with the purpose that the offense of robbery of the Orange Street Inn be committed, before or during the commission of that offense with the purpose to promote or facilitate such commission, he aided or abetted Gregory John Jellison in the commission of the offense by driving the get away car.

Count II: On or about June 2, 1987, the above-named Defendant knowingly had in his possession a dangerous drug, Tegretol.

Count III: On or about May 21, 1987, the above-named Defendant, in the course of committing a theft of the Snow King, purposely or knowingly put Kathy Baldry and/or Bob Baily and/or Ann Cowan in fear of immediate bodily injury.

Count IV: On or about May 24, 1987, the above-named Defendant, in the course of committing a theft of Dominos, purposely or knowingly put Roger Diettrich and/or Steve Anderson in fear of immediate bodily injury.

Count V: On or about May 30, 1987, the above-named Defendant, in the course of committing a theft of Pickle O'Petes, purposely or knowingly put Tom Wheatley and/or Chris Moore and/or Montie Annear in fear of immediate bodily injury.

A list of the possible witnesses for the State now known to the prosecution is as follows:

(Witness endorsement omitted)

DATED this 29th day of September, 1987

_____

Karen S. Townsend
Deputy County Attorney

APPENDIX F
SUMMARY OF STATE AND FEDERAL WEAPON STATUTES

JURISDICTIONS WHERE THE WEAPON STATUTE CREATES A SEPARATE OFFENSE.

Twenty states and the federal system have weapons statutes defining an additional offense that must be charged and proved. They are: Connecticut [Conn. Gen. Stat. §53(a)-216 (1958, 1989 Revision)]; Delaware [Del. Code Ann. tit. 11 §1447 (1974)]; Florida [Fla. Stat. Ann. §790.07 (West 1943, 1987 Supp.)]; Georgia [Ga. Code Ann. §26-9908(a) (1981, 1988 Supp.)]; Illinois [Ill. Rev. Stat. Ch. 38 §33A-2, Ch. 38 §33A-3, and Ch. 38 §1005-8-2 (1971, 1988 Supp.)]; Maryland [Md. Crimes and Punishments Ann. Art. 27 §36B(d) (1957, 1988 Supp.)]; Massachusetts [Mass. Gen. Laws Ann. 265§ 18B (1958, 1989 Supp.) *See also, Commonwealth v. Hawkins*, 490 N.E.2d 489 (Mass. App. 1986) review denied 494 N.E.2d 388, 497 N.E.2d 1096]; Michigan [Mich. Comp. Laws Ann. §750.227(b) (West 1948, 1988-89 Supp.)]; Missouri [Mo. Rev. Stat. §571.05 (1986)]; Nebraska [Neb. Rev. Stat. §28-1205 (1943, Reissue of 1985)]; New Hampshire [N.H. Rev. Stat. Ann. §650-A:1 (1986)]; New Jersey [N.J. Stat. Ann. §§2C: 39-4, 2C: 43-(6) (West 1937, 1988 Supp.)]; New York [N.Y. Penal Law §§265.08, 265.09 (McKinney 1916, 1989 Supp.)]; Oklahoma [Okla. Stat. Ann. tit. 21§1287 (West 1986 Supp.)]; Rhode Island [R.I. Gen. Laws §11-47-3 (1956, 1981 Reenactment)]; South Carolina [S.C. Code Ann. §16-23-490 (Law Co-op 1988 Supp.)]; South Dakota [S.D. Codified Laws Ann. §22-14-12 (1988)]; United States [18 U.S.C. §924(c)(1) (1988 Supp.) *See also, United States v Sudduth*, 457 F. 2d 1198 (10th Cir. 1972)]; Vermont [Vt. Stat. Ann. tit. 13 §4005 (1974)]; Virginia [Va. Code §18.2 - 53.1 (1950)] and; Wyoming [Wyo. Stat. §6-8-101 (1977, 1988 Supp.)].

JURISDICTIONS HAVING WEAPON STATUTES THAT INCLUDE A PROVISION REQUIRING THAT WEAPON USAGE BE TREATED AS AN ELEMENT OF THE UNDERLYING OFFENSE.

Nine states have weapon statutes that provide for an additional term of incarceration and include a provision requiring that that factor be included in the charging document and submitted to the the trier of fact for a factual determination. They are: Arizona [Ariz. Rev. Stat. Ann. §13-604(f),(k) (1959, 1988-89 Supp.)]; California [Cal. Penal Code §12022 (1972); Cal. Penal Code §12022.5 (1972, 1989 Supp.); Cal. Penal Code §969(c),(d) (1972)]; Colorado [Colo. Rev. Stat. §16-11-309(1)(a)(4) (1986, 1988 Supp.)]; Idaho [Idaho Code §19-2520 (1971, 1988 Supp); Maine [Me. Rev. Stat. Ann. tit. 17A §1252(4) (1964)]; Nevada [Nev. Rev. Stat. §193.165 (1986)]; New Mexico [N.M. Stat. Ann. §31-18-16 (1978, 1987 Replacement Pamphlet)]; Ohio [Ohio Rev. Code Ann. §2929.71 (1957, 1988 Supp.)] and Tennessee [Tenn. Code Ann. §39-6-1710 (1982)].

JURISDICTIONS WHERE THE COURTS HAVE DETERMINED THAT WEAPON USAGE MUST BE TREATED AS AN ELEMENT OF THE UNDERLYING OFFENSE.

Five states and the District of Columbia have weapons statutes that provide for an additional term of incarceration and their courts have determined that weapon usage must be charged and found to be true by the trier of fact. They are: Alabama [Ala. code §13-5-6 (1975, 1982 Replacement Volume) *See also, Holloway v. State*, 477 S. 2d 487, 488 (Ala. Cr. App. 1985)]; Arkansas [Ark. Code Ann. §5-4-505 (1988) *See also, Johnson v. State* 249 Ark. 208, 458 S.W.2d 409, 412 (1970)]; District of Columbia [D.C. Code Ann. §22-3202 (1981, 1988 Supp.) *See also, Sutton v. United States*, 434 F.2d 462, 473, (D.C. Cir. 1970) *cert. den.*, 402 U.S. 988]; Florida [Fla. Stat. Ann. §775.087 (West 1943, 1989 Supp.) *See also, Blackwelder v. State*,

476 So.2d 281 (Fla. App. 1 Dist. 1985)]; Utah [Utah Code Ann. §76-3-203 (1978, 1988 Supp.) *See also, State v. Angus*, 581 P.2d 992, 995 (Ut. 1985)]; and Wisconson (Wis. Stat. Ann. §939.63 (1967, 1987 Supp.) *See also, State v. Carrington*, 397 N.W. 2d 484 (Wis. 1986).

JURISDICTIONS WHERE THE WEAPON STATUTE PROVIDES FOR THE IMPOSITION OF A MANDATORY MINIMUM TERM WITHIN THE MAXIMUM TERM OTHERWISE PROVIDED FOR THE OFFENSE.

Fifteen states have weapon statutes that limit the sentencing judge's discretion in imposing a sentence within the maximum term otherwise provided for the underlying offense. Although some states require that weapon usage be charged and proved before these statutes can be applied, that requirement is not found in the Due Process Clause of the federal constitution. *See McMillan v. Pennsylvania*, 477 U.S. 79 (1986). States in this category include: Alaska [Alaska Stat. §12.55.125(c) (1968, 1984 Update)]; Hawaii [Hawaii Rev. Stat. §706-660.1 (1985, 1988 Supp.)]; Indiana [Ind. Code Ann. §35-50-2-2(b)(4) (Burns 1985, 1988 Supp.)]; Iowa [Code of Iowa §902.7 (1949, 1988 Supp.); Iowa Rule of Criminal Procedure 6(6)]; Kansas [Kan. Stat. Ann. §21-4618 (1988)]; Kentucky [Ky. Rev. Stat. Ann. §533.060 (Baldwin 1985, 1988 Supp.)]; Lousiana [La. Code Crim. Proc. Ann. art 893.1 (1973)]; Minnesota [Minn. Stat. Ann. §609.11 subdiv. 5 (1946)]; New Jersey [N.J. Stat. Ann. §2C:43-6(c) (West 1982, 1988 Supp.)]; North Carolina [N.C. Gen. Stat. §14-2.2 (1986)]; North Dakota [N.D. Cent. Code §12.1-32-02.1 (1959)]; Oregon [Or. Rev. Stat. §161.610(2) (1983, 1987 Replacement Part)]; Pennsylvania [42 Pa Cons.Stat §9712 (1982)]; Texas [Texas Stat. Ann. art 42.12 Section 3g (a)(2),(b) and 42.12 Section 42.18 Section 8(b) (Vernon 1977, 1987 Supp.)] and West Virginia [W. Va. Code §62-12-2(b),(c)(1989 Supp.)].

JURISDICTIONS THAT DO NOT HAVE A WEAPON STATUTE.

Mississippi and Washington do not have weapon statutes.

CONCLUSION

The above summary includes the federal system, the District of Columbia and every state except Montana. Montana is, therefore, the only jurisdiction in the United States where a weapon statute providing for an additional sentence is applied absent a specification in the charging document and a determination by the trier of fact.

FILED
AUG 9 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-2004 (2)

In The

Supreme Court of the United States

October Term, 1989

THOMAS F. KRANTZ,

Petitioner,

-v-

STATE OF MONTANA,

Respondent.

On Petition For A Writ Of Certiorari
To The Montana Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

MARC RACICOT
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August 1990

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the issue presented by petitioner is prematurely placed before this Court and unripe for adjudication.

2. Whether the Sixth Amendment or the Fourteenth Amendment to the United States Constitution prohibits the application of Montana's weapon enhancement statute as a sentencing factor being considered by the trial court at the time of sentencing.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The statute listed below is in addition to those listed by the petitioner. (Petition at 2-3.)

Mont. Code Ann. § 45-5-401 (1987):

> **Robbery.** (1) A person commits the offense of robbery if in the course of committing a theft he:
>
> (a) inflicts bodily injury upon another;
>
> (b) threatens to inflict bodily injury upon any person or purposely or knowingly puts any person in fear of immediate bodily injury; or
>
> (c) commits or threatens immediately to commit any felony other than theft.
>
> (2) A person convicted of the offense of robbery shall be imprisoned in the state prison for a term of not less than 2 years or more than 40 years and may be fined not more than $50,000, except as provided in 46-18-222.
>
> (3) "In the course of committing a theft" as used in this section includes acts which occur in an attempt to commit or in the commission of theft or in flight after the attempt or commission.

STATEMENT OF THE CASE

The respondent, State of Montana, agrees with the petitioner's statement of the case with the exception of two critical points. The petitioner was not charged with use of a weapon during the commission of his felonies because no Montana or federal statute requires such a charge. While no mention of use of a weapon was made

in the information, the record shows that the State alleged the use of a weapon in its affidavit and motion for leave to file the information. (Petition [Pet.] App. A at 2a, 15a.) The record also indicates that the prosecution repeatedly elicited testimony that petitioner and his accomplice used a handgun during the robberies. (Pet. App. A at 16a.) The Montana Supreme Court found specifically that the petitioner had "actual notice that use of a weapon would be considered during sentencing." (Pet. App. A at 16a.) The Montana Supreme Court found that failure to specifically place an allegation of weapon usage in the information was harmless error. (Pet. App. A at 16a.)

Contrary to petitioner's statement, the Montana Supreme Court did not hold that the weapon enhancement statute at issue "bore a close resemblance to statutes defining crimes." (Pet. at 6.) The Montana Supreme Court did recognize that the weapon enhancement statute contained elements "similar to those found in substantive criminal statutes" but the weapon enhancement statute also required elements "not necessary to establish guilt of the underlying crime." (Pet. App. A at 12a, 13a.)

SUMMARY OF THE ARGUMENT

This Court should deny the petition for writ of certiorari because the issue presented, the constitutionality of Montana's weapon enhancement statute as applied to petitioner, is not ripe for review. However, should this Court determine the issue is ripe, the instant case is factually distinguishable from *Specht v. Patterson* and

Mullaney v. Wilbur, and is controlled by *McMillan v. Pennsylvania*, and more importantly by *Walton v. Arizona*, a very recent case decided by this Court and not available to petitioner when he asked this Court for certiorari. The Montana Supreme Court's decision in *State v. Krantz*, therefore, does not conflict with any decision by this Court, and the petition should be denied.

ARGUMENT

I. THE ISSUE PRESENTED BY THIS CASE, THE CONSTITUTIONALITY OF MONTANA'S WEAPON ENHANCEMENT STATUTE, IS NOT RIPE FOR REVIEW BY THIS COURT.

While the Montana Supreme Court determined that petitioner had standing to challenge the constitutionality of Mont. Code Ann. § 46-18-221, the weapon enhancement statute, the Court determined petitioner's standing by looking at the two sentencing issues before the Court on appeal: his use of a weapon in the commission of the underlying felonies and the designation of petitioner as a dangerous offender. *State v. Krantz*, 47 St. Rptr. 454, 457, 788 P.2d 298, 301 (1990). His designation as a dangerous offender has not been placed before this Court for review, and petitioner is asking only that Mont. Code Ann. § 46-18-221 be invalidated. The Montana Supreme Court's decision, however, is unclear as to whether the finding of standing was made because of his designation as a dangerous offender for parole purposes or the application of the weapon enhancement statute. An issue that was not addressed, however, by the Montana Supreme Court was the issue of ripeness.

Generally, courts refuse to rule on a constitutional issue in advance of the necessity of deciding it, nor will courts accept constitutional issues for adjudication when the controversy is premature or unripe. This Court has declared that it will not assume in advance that a state will so construe its laws to bring them in conflict with the Federal Constitution. *Oil Chemical and Atomic Workers International Union v. Missouri*, 316 U.S. 363 (1960).

Petitioner is asking this Court to grant certiorari because of a "potential" for erosion of Sixth Amendment standards (Pet. at 16), or a hypothetical violation of due process (Pet. at 13, 19), even though the application of the weapon enhancement statute to petitioner did not increase the sentence beyond the statutory maximum for the two counts of robbery for which he was found guilty.

Petitioner was sentenced to 30 years, concurrent, on each conviction with an additional 10-year sentence to be served consecutively because of the use of a weapon during the commission of the felonies. (Pet. App. A at 24a, 25a.) The maximum sentence for each count of robbery under Mont. Code Ann. § 45-5-401 is 40 years. Petitioner was subject to a sentence of 80 years for the felonies with an additional 10 for the use of a weapon, or 90 years. However, petitioner was sentenced to a total of 40 years. (Pet. App. C at 24a, 25a.)

A brief review of petitioner's argument is needed to apply the ripeness argument. An important case and one relied on by the Montana Supreme Court dealt with a sentencing scheme which did not increase the maximum sentence possible for the underlying crime, notwithstanding the mandatory nature of the statute. *McMillan v.*

Pennsylvania, 477 U.S. 79 (1986). This Court found such a statutory scheme constitutional, as discussed *infra*. Petitioner now seeks to distinguish Montana's sentence enhancement statute on the basis that, unlike the Pennsylvania statute, the Montana statute enables the maximum sentence for the underlying offense to be increased. Therefore, the rule of law enunciated in *McMillan*, *supra*, and followed by the Montana Supreme Court does not apply.

Petitioner claims in his petition that the statute allows a sentencing court, after consideration and application of the weapon enhancement statute, to sentence a defendant beyond the maximum term of incarceration for the underlying offense. (Pet. at 19.) This argument, while philosophically interesting, is simply not preserved by the facts of this case. Petitioner claims that because of the possibility that the statute, as applied against someone else, might increase the maximum possible sentence, this Court should grant certiorari, and review his arguments. That issue is simply not ripe for adjudication in this instance.

Petitioner has not alleged the requisite particularized injury in a concrete manner. Nor does the case present such an anomaly or a departure from the fundamental principles of constitutional law to warrant review. *See Thompson v. United States*, 469 U.S. 1024 (1984). The redress that he seeks is the invalidation of Mont. Code Ann. § 46-18-221, Montana's weapon enhancement statute, because it has the potential to increase a sentence beyond the statutory maximum for a crime. This issue is too speculative and not properly before this Court. The

petition for certiorari should be denied because the issue is not ripe.

II. MONTANA'S WEAPON ENHANCEMENT STATUTE, WHICH IS INVOKED AT SENTENCING, VIOLATES NEITHER THE FOURTEENTH NOR THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The petitioner challenges the constitutionality of Mont. Code Ann. § 46-18-221 claiming the Montana Legislature erred when it created the weapon enhancement statute as a sentencing consideration for the judge rather than a separate offense which must be charged in the information and proved beyond a reasonable doubt to the jury. Petitioner claims the application of the weapon enhancement statute to him violated his rights guaranteed under the Sixth and Fourteenth Amendments to the United States Constitution. This argument failed before the Montana Supreme Court. It has failed before the Federal Court for the District of Montana and has failed before this Court. The petition for a writ of certiorari should be denied.

There are two cases discussed below which must be introduced. The Federal District Court of Montana recently decided *Nichols v. McCormick*, No. CV-89-028-BU-PGH (D. Mont. May 4, 1990), a federal habeas corpus action. The court's decision is attached as Appendix 1. In *Nichols*, the petitioner raised the identical constitutional arguments challenging Montana's weapon enhancement statute. Those arguments were rejected after comparison with and analysis of federal case law, the Sixth and Fourteenth Amendments, and the Montana statute.

A second case, *Walton v. Arizona*, 110 S. Ct. 3047, 58 U.S.L.W. 4994 (1990), was decided by this Court on June 27, 1990. In *Walton*, this Court rejected the argument that the factual determination by the court of aggravating and mitigating circumstances in a death penalty case created a separate offense that must be determined by a jury beyond a reasonable doubt. Petitioner in *Walton* pressed arguments parallel to the ones present in this case, and this Court rejected those arguments.

Both *Walton* and *Nichols* are discussed in detail below.

Defining a crime is a matter of state law, *Patterson v. New York*, 432 U.S. 197 (1977), and Montana has defined the crime for which petitioner was convicted as robbery, Mont. Code Ann. § 45-5-401. Petitioner's guilt on two counts of robbery was found beyond a reasonable doubt by the jury in *Krantz*, 47 St. Rptr. at 455, 456, 788 P.2d at 300. The Montana scheme of sentencing, after a finding of guilt, includes an increased term for use of a weapon during the commission of the felonies, Mont. Code Ann. § 46-18-221, and this statute was applied at sentencing to Krantz.

Petitioner argues that the Sixth and the Fourteenth Amendments to the United States Constitution require the weapon enhancement statute to be treated as a separate offense, compelling inclusion of specific allegations in the information and factual findings of the use of a weapon by a jury beyond a reasonable doubt. There is no constitutional requirement that Montana's weapon enhancement statute be classified as creating a separate offense and petitioner's argument was soundly rejected

by the Montana Supreme Court. This Court in *McMillan* addressed various constitutional aspects of a state firearm enhancement provision, a statute which operated similarly to Montana's. The Pennsylvania statute imposed a mandatory minimum period of incarceration, as does Montana's.[1] This Court held that such a statute may properly be treated as a sentence enhancement provision rather than a separate crime and consequently, the facts of enhancement need not be found by a jury beyond a reasonable doubt. *McMillan*, 477 U.S. at 91.

The elements of enhancement need only be determined by the sentencing judge by a preponderance of the evidence. *McMillan*, 477 U.S. at 88, 93. This Court further held that there was no Sixth Amendment right to a jury sentencing even when the sentence is based on specific findings of fact. *McMillan*, 477 U.S. at 93.

This Court has found a state sentencing statute that did not comport with traditional due process considerations, but the facts presented were extreme. Petitioner relies heavily on this case, *Specht v. Patterson*, 386 U.S. 605 (1967). In that case, the Supreme Court addressed an enhancement statute that could increase the period of incarceration beyond the maximum term for the underlying offense.

The problem confronted in *Specht* was the fact that the state of Colorado had sentenced the defendant without notice or hearing under Colorado's Sex Offender's

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[1] The provision did not increase the maximum sentence for the underlying offense.

Act. The Act provided that after reviewing the defendant's psychiatric evaluation, the trial court would determine if the defendant was a threat to the public, a habitual offender, or mentally ill. If the court so found, the defendant could be incarcerated for an indeterminate term of one day to life. *Specht*, 386 U.S. at 607-08.

This Court reasoned that due process would require that the defendant be present with counsel during the sentencing hearing, have an opportunity to be heard, confront the witnesses against him, have the right to cross-examination and to offer evidence, and that there be findings adequate for a meaningful appeal. This Court did not interpret due process requirements to require a finding by a jury beyond a reasonable doubt on all factual issues. This Court did reverse the sentence, holding that the sentencing procedure required determination of new factual issues under a discreet statute and that due process entitled the defendant to trial procedures on those issues. *Specht*, 386 U.S. at 609-10.

Petitioner's reliance on *Specht* is misplaced and was rejected by the Montana Supreme Court and the federal court in *Nichols*. In cases decided after *Specht*, this Court limited the potentially broad ramifications of *Specht* and its progeny.[2] That line of sentencing cases has culminated in *Walton v. Arizona, supra.*

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[2] *See Mullaney v. Wilbur*, 421 U.S. 684 (1975), and *In re Winship*, 397 U.S. 358 (1970), which gave the states greater latitude in defining elements of a crime and distinguishing sentencing criteria.

In *Walton*, the defendant was found guilty of first-degree murder and was sentenced in a separate sentencing hearing before the court as required by state law, Ariz. Rev. Stat. Ann. § 18-703(B). A separate sentencing hearing was conducted to determine whether the sentence, after the finding of guilt for first degree murder, should be death or life imprisonment. The judge was required by the statute to determine at sentencing the existence or nonexistence of facts which acted as aggravating or mitigating circumstances as defined by Arizona Code.

One of the mitigating factors was whether or not the offense was committed in an especially "heinous, cruel or depraved manner." Ariz. Rev. Stat. Ann. § 18-703(F)(6). The burden of establishing aggravating circumstances was statutorily placed on the prosecution, while the burden of establishing mitigating circumstances under the Arizona statutory scheme was placed on the defendant. Ariz. Rev. Stat. Ann. § 18-703(C). The trial court in *Walton* found that two aggravating circumstances were present and no mitigating circumstances were substantial enough to call for leniency. The court, thereafter, sentenced Walton to death. *Walton*, 58 U.S.L.W. at 4993.

Walton's first argument on appeal was that every finding of fact underlying the sentencing decision had to be made by a jury, not a judge, and the Arizona scheme would only be constitutional under the Sixth and Fourteenth Amendments if a jury decided what facts constituting aggravating or mitigating circumstances were present. *Walton*, 58 U.S.L.W. at 4994. This Court refused to accept Walton's constitutional challenge of his sentence, and reiterated its prior holdings, which specifically

rejected constitutional challenges to death sentencing schemes which provided for sentencing by the judge and not the jury. *Walton*, 58 U.S.L.W. at 4994, citing *Hildwin v. Florida*, 490 U.S. ___ (1989); *Spaziano v. Florida*, 468 U.S. 447 (1984); *Proffitt v. Florida*, 428 U.S. 242 (1976). As this Court noted in *Walton*, citing *Poland v. Arizona*, 476 U.S. 147 (1986):

> "Aggravating circumstances are not separate penalties or offenses, but are 'standards to guide the making of [the] choice' between the alternative verdicts of *life* and *death* imprisonment. Thus, under Arizona's capital sentencing scheme, the judge's finding of any particular aggravating circumstance does not of itself 'convict' a defendant (*i.e.*, require the death penalty), and the failure to find any particular aggravating circumstance does not 'acquit' a defendant (*i.e.*, preclude the death penalty)."

Walton, 58 U.S.L.W. at 4994, citing *Poland*, 476 U.S. at 156.

This Court confirmed that a state was not required to "denominate aggravating circumstances 'elements' of the offense or permit only a jury to determine the existence of such circumstances." *Walton*, 58 U.S.L.W. at 4994. A judge could make factual determinations at sentencing pursuant to the statutory sentencing schemes and not violate the Sixth or Fourteenth Amendments. *Walton*, 58 U.S.L.W. at 4994. It is precisely the factual determination made by the sentencing judge that petitioner used a weapon in the commission of his felonies that he finds constitutionally repugnant. However, this Court has *already* decided this issue.

Montana's weapon enhancement statute is strikingly similar to the Arizona sentencing statute in that, after a

finding of guilt beyond a reasonable doubt of the underlying crime, the court is required to determine at the time of sentencing, the use of a weapon in the commission of the crime. The statute then compels the court to enhance the sentence from one to ten years pursuant to the statute. Mont. Code Ann. § 46-18-221.

The designation of elements of crimes and sentencing criteria is a matter for the states. The Montana Supreme Court explained its analysis of the federal cases cited by *both* parties:

> The message of *Patterson* and *McMillan* is that the decision to designate specified factors as elements of a crime as affirmative defenses, or as sentencing factors, is fundamentally a decision left to the states. In *McMillan* the Court restated the basic premise of *Patterson*:
>
> "It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion, and its decision in this regard is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

State v. Krantz, 47 St. Rptr. 454, 460, 788 P.2d 298, 303, citing *McMillan*, 477 U.S. at 85 (quoting *Patterson*, 432 U.S. at 201, 202).

In analyzing federal case law, including *Patterson, McMillan, Specht, and Mullaney,* the Montana Supreme Court disagreed with the petitioner's interpretation of the cases. Petitioner argued that a logical conclusion to be drawn from these cases would be as follows. Factors which may increase a sentence beyond the maximum for the underlying crime were separate crimes or elements of a crime subject to full due process procedures. *Krantz,* 47 St. Rptr. at 460, 788 P.2d at 303. The Montana Supreme Court rejected that argument, finding it too narrow an interpretation of federal case law. *Id.*

The Montana court also commented on the United States Supreme Court and its rationale in *McMillan, supra*:

> The Court's primary concern in this series of cases is that states would circumvent due process by redefining the essential elements of guilt as affirmative defenses or as sentencing factors.

Krantz, 47 St. Rptr. at 461, 788 P.2d at 304. Neither the Montana statute nor the Legislature's intent when it created the sentencing scheme leads to a conclusion that the statute transforms elements of a crime into sentencing factors:

> The 1977 Montana Legislature adopted the weapon enhancement statute as part of a bill intended to limit the discretion of sentencing courts by establishing guidelines and minimum mandatory sentences for potentially violent crimes. Consideration of H.B. 261 before the Senate Judiciary Comm. 45th Leg. (1977) (statement of Rep. Ramirez). Like the Pennsylvania statute challenged in *McMillan,* the Montana statute simply takes one factor traditionally used in sentencing, the use of a weapon during a crime, and dictates the minimum weight the

> court must assign. *See McMillan*, 477 U.S. at 89-90, 106 S.Ct. at 2418, 91 L.Ed.2d at 78-79.

Krantz, 47 St. Rptr. at 461, 788 P.2d at 304.

The weapon enhancement statute in Montana does not impermissibly erode or alter the elements of the underlying crime as the Montana court determined.

> The elements of the underlying crime in this case, robbery, have remained essentially the same since territorial times. Compare § 45-5-401, MCA (1989) with Laws of Mont. Ch. VI, § 71 (1879).

Krantz, 47 St. Rptr. at 461, 788 P.2d at 304. In a conclusion that comports squarely with the line of United States Supreme Court cases discussed by both parties, the Montana Supreme Court found that:

> [a]ll sentencing factors may, and often do, require the court to consider facts not established during trial. These elements are as much pertinent and necessary attributes of traditional sentencing considerations as they are attributes of substantive crimes.

Krantz, 47 St. Rptr. at 461, 462, 788 P.2d at 304. The decision by the Montana Supreme Court was not an anomaly, but only the logical culmination of a criminal matter when viewing the legal foundation upon which the case was based. *See State v. Forsyth*, 45 St. Rptr. 1577, 761 P.2d 363 (1988); *State v. Spurlock*, 225 Mont. 238, 731 P.2d 1315 (1987); *State v. Davison*, 188 Mont. 432, 614 P.2d 489 (1980).

As prefaced above, the Federal District Court for Montana has already reviewed Montana's weapon enhancement statute and found it constitutional under

Sixth and Fourteenth Amendment challenges in *Nichols v. McCormick, supra.* Nichols filed a petition for habeas corpus in the Montana Federal District Court after his state appeal for convictions of the criminal offenses of kidnapping and misdemeanor assault had been denied. *State v. Nichols,* 222 Mont. 71, 720 P.2d 1157 (1986). With the petition for the writ of habeas corpus Nichols placed before the Federal Court the constitutionality of Montana's weapon enhancement statute claiming that the weapon enhancement statute, when it was applied at the time of sentencing, violated the Sixth and Fourteenth Amendments.

The Federal Court rejected Nichols' argument that the statute contravened the due process clause.

> The decision of the Montana Supreme Court in *Krantz* establishes the Montana statutory plan was not intended by the Legislature to make possession of a weapon an element of the underlying offense, in Nichols' case kidnapping, which must be proved beyond a reasonable doubt.

Nichols, (App. at 17).

Under the relevant state law, the identified fact, *i.e.,* possession of a weapon, was not essential to establish criminality in the first instance. The Federal Court held that the Montana weapon enhancement statute did not violate the due process clause of the Fourteenth Amendment of the United States Constitution and concluded that the possession of a weapon did not constitute an element of the substantive underlying crime of kidnapping. (App. at 23.)

The Federal Court in reviewing Nichols' petition began with an examination of Montana case law and noted that the Montana Supreme Court had expressly held on many occasions that the enhancement statute did not create a separate substantive offense but only provided "for an enhanced penalty once the defendant has been found guilty of an underlying offense. *State v. Davison*, 188 Mont. 432, 614 P.2d 489, 496-97 (1980)." (App. 1 at 5.) *State v. Krantz, supra, State v. Forsyth*, 233 Mont. 389, 761 P.2d 363 (1988), and *State v. Spurlock*, 225 Mont. 238, 731 P.2d 1315.[3]

Petitioner here attempts to convince this Court that Mont. Code Ann. § 46-18-221 creates a separate offense, use of a weapon in the commission of a felony, in addition to the underlying crime. Petitioner urges that a finding of the so-called separate offense calls for the full panoply of due process rights as opposed to the statute's application as simply limiting the sentencing court's discretion by mandating a minimum sentence. As the *Nichols* court stated, this characterization was precisely the one rejected by the Montana Supreme Court in *Krantz, supra*. (App. 1 at 6.) As the Federal District Court succinctly stated: "The obvious thrust of Krantz' argument was that the possession of a firearm is an element of the crime for which he was being sentenced and, accordingly, is a question of fact which must be proved beyond a reasonable doubt." (App. 1 at 6.)

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[3] These cases comprise only a few of the decisions affirming the constitutionality of the State's weapon enhancement statute. *See also Krantz*, 47 St. Rptr. at 462, 788 P.2d at 305.

After discussing the Montana Supreme Court's review of federal precedence the Federal District Court stated:

> The linchpin of the *Krantz* decision lies in the court's conclusion that the use of a weapon, although a finding of fact essential to imposition of a penalty under the weapon enhancement statute, is not an element essential to the finding of guilt of the underlying crime. 47 St.Rptr. 454. *Ergo*, the court reasoned, the enhancement statute does not exceed the state's authority to pursue its fundamental right of defining the crime and prescribing punishment. 47 St.Rptr. at 460-61. The court stated its belief the "system" established by the Montana Legislature for enhancement of penalty in crimes involving the use of a weapon does not circumvent due process of law by "redefining the essential elements of guilt as affirmative defenses or as sentencing factors". 47 St.Rptr. 454,

(App. at 7, 8.) The Nichols' court faced squarely whether the statutory scheme of Montana's weapon enhancement statute comported with the due process requirements as outlined in *In Re Winship, Specht, Mullaney, Patterson,* and *McMillan*.

The court analyzed whether possession of a firearm constituted a fact necessary to define the crime for which Nichols was convicted and thus required proof beyond a reasonable doubt. (App. 1 at 17.) Petitioner's only support for this position was provided by *Adamson v. Ricketts*, 856 F.2d 1011 (9th Cir. 1988), *cert. denied*, 110 S. Ct. 3287 (June 28, 1990). However, that case lost its precedential value when this Court denied certiorari on June 28, 1990. The controlling case, *Walton v. Arizona, supra*, was decided the day before, June 27, 1990.

Even without the guidance of *Walton*, the Federal Court found Montana's statutory sentencing scheme differed from the one addressed in *Adamson*, and therefore, *Adamson* was not dispositive. The court upheld the statute as constitutional.

Petitioner attempts to inflate this issue to constitutional proportions, however he is arguing in the face of clear legal precedents. His constitutional arguments have been rejected by the Montana Supreme Court, the Federal District Court for Montana, and the United States Supreme Court. Montana's weapon enhancement statute is a sentencing statute and does not constitute a separate crime. The statute, Mont. Code Ann. § 46-18-221, does not violate the Sixth or Fourteenth Amendment.

CONCLUSION

For the reasons presented above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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August 1990

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA, BUTTE DIVISION

DAN NICHOLS

V.

JACK McCORMICK, Warden

JUDGMENT IN A CIVIL CASE

CASE NUMBER: CV- 89-028-BU-PGH

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[x] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the present petition for habeas corpus relief, pursuant to 28 U.S.C. § 2254, be, and the same hereby is, DENIED.

May 4, 1990
Date

LOU ALEKSICH, JR.
Clerk

FILED, ENTERED AND NOTED
IN CIVIL JUDGMENT BOOK
Volume Page

/s/ Renate Weldele
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

DAN NICHOLS,	)	
Petitioner,	)	NO. CV-89-028-BU-PGH
vs.	)	
JACK McCORMICK, Warden,	)	MEMORANDUM AND ORDER
Respondent.	)	
	)	FILED
	)	1990 MAY – 4 AM 8:17

The petitioner, Dan Nichols, challenges the judgment of conviction entered against him upon a trial by jury in the District Court of the Fifth Judicial District of the State of Montana for the criminal offenses of kidnapping and misdemeanor assault. *See, State v. Nichols*, 222 Mont. 71, 720 P.2d 1157 (1986). Nichols was sentenced to a term of imprisonment of twenty years and six months; a period comprised of a ten-year term for the kidnapping conviction, a six-month term for the misdemeanor assault conviction and a ten-year term, pursuant to the Montana sentence enhancement statute, Mont.Code Ann. § 46-18-221 (1985), for use of a weapon while engaged in the commission of felony kidnapping. 720 P.2d at 1158. Nichols instituted the present action for habeas corpus

relief pursuant to 28 U.S.C. § 2254, challenging the constitutional validity of the ten-year sentence imposed upon him under the weapon enhancement statute.[1]

It is undisputed the charging document, an information, filed by the State, did not charge Nichols with a violation of Mont.Code Ann. § 46-18-221. Nonetheless, the sentencing court utilized Mont.Code Ann. § 46-18-221 to "enhance" Nichols' sentence of incarceration by ten years. Nichols' petition places in issue the constitutionality of Montana's weapon enhancement statute, Mont.Code Ann. § 46-18-221 (1985), on its face and as applied to Nichols. Nichols contends the trial court's enhancement of his sentence, pursuant to section 46-18-221, served to deprive him of his right to due process of law, his right to know the nature and cause of the criminal accusation against him, and his right to a

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[1] The respondent seeks dismissal of the petition upon the ground Nichols is procedurally barred from raising the subject claims in federal habeas proceedings. *See, Wainwright v. Sykes*, 433 U.S. 72 (1977); *Murray v. Carrier*, 477 U.S. 478 (1986). Review of proceedings in the Montana Supreme Court upon Nichols' petition for post-conviction relief, wherein Nichols asserted the identical claims, convinces the court the present situation falls within the purview of the rule announced in *Huffman v. Ricketts*, 750 F.2d 798, 800 (9th Cir. 1984). The State contends the Montana Supreme Court did not address the merits of Nichols' claims. The order of the Montana Supreme Court denying Nichols' petition is somewhat ambiguous. However, cognizant of the fact the default rule enunciated in *Sykes* is a rule based upon comity, the balance must be struck in favor of allowing Nichols to have his claim resolved upon the merits.

jury determination on the elements of the crime, in violation of the sixth and fourteenth amendments.[2]

I.

Montana's weapon enhancement statute provides that anyone convicted of any offense shall, "in addition to the punishment provided for the commission of such offense, be sentenced to a term of imprisonment of not less than two years or more than ten years" if "while engaged in the commission of the offense" the defendant is found to have "knowingly displayed, brandished, or otherwise used a firearm." Mont.Code Ann. § 46-18-221.[3]

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[2] Nichols' petition was referred to the United States Magistrate for the District of Montana for recommended disposition in accordance with 28 U.S.C. § 636. The Magistrate filed his report with the court on January 4, 1990, recommending dismissal of the petition. The court reviews the objections to the report *de novo*.

[3] Mont.Code Ann. § 46-18-221 (1985) provides in full:

> **Additional sentence for offenses committed with a dangerous weapon.** (1) A person who has been found guilty of any offense and who, while engaged in the commission of the offense, knowingly displayed, brandished, or otherwise used a firearm, destructive device, as defined in 45-8-332(1), or other dangerous weapon shall, in addition to the punishment provided for the commission of such offense, be sentenced to a term of imprisonment in the state prison of not less than 2 years or more than 10 years, except as provided in 46-18-222.
>
> (2) A person convicted of a second or subsequent offense under this section shall, in addition to

(Continued on following page)

The Montana Supreme Court has expressly held the enhancement statute does not create a separate, substantive offense, but only "provide[s] for an enhanced penalty once the defendant has been found guilty of an underlying offense." *State v. Davison*, 188 Mont. 432, 614 P.2d 489, 496-97 (1980). A review of the more recent Montana decisional law evinces the continued vitality of the holding in *Davison*. *See, State v. Krantz*, ___ Mont. ___, 47 St.Rptr. 454

(Continued from previous page)

the punishment provided for the commission of the present offense, be sentenced to a term of imprisonment in the state prison of not less than 4 years or more than 20 years, except as provided in 46-18-222. For the purposes of this subsection, the following persons shall be considered to have been convicted of a previous offense under this section:

(a) a person who has previously been convicted of an offense, committed on a different occasion than the present offense, under 18 U.S.C. 924(c); and

(b) a person who has previously been convicted of an offense in this or another state, committed on a different occasion than the present offense, during the commission of which he knowingly displayed, brandished, or otherwise used a firearm, destructive device, as defined in 45-8-332(1), or other dangerous weapon.

(3) The imposition or execution of the minimum sentences prescribed by this section may not be deferred or suspended, except as provided in 4618-222.

(4) An additional sentence prescribed by this section shall run consecutively to the sentence provided for the offense.

(1990); *State v. Forsyth*, ___ Mont. ___, 761 P.2d 363 (1988); *State v. Spurlock*, 225 Mont. 238, 731 P.2d 1315 (1987).

The gravamen of Nichols' position lies in his assertion that Mont.Code Ann. § 46-18-221 creates a separate offense calling for a separate penalty, as opposed to merely operating to limit the sentencing court's discretion by prescribing a mandatory minimum sentence. This precise characterization of the weapon enhancement statute was rejected by the Montana Supreme Court in *Krantz*. The appellant in *Krantz* argued the weapon enhancement statute creates a distinct crime separate from the underlying offense. 47 St.Rptr. at 454. Accordingly, Krantz contended due process of law required that a violation of the statute must be set forth in the charging instrument and submitted to the jury for a determination of all pertinent facts beyond a reasonable doubt. Krantz, as does Nichols in the case at bar, asserted the imposition of a sentence pursuant to the weapon enhancement statute, when a violation of the statute was not charged, constituted a violation of both his right to trial by jury and due process of law. The obvious thrust of Krantz' argument was that the possession of a firearm is an element of the crime for which he was being sentenced and, accordingly, is a question of fact which must be proved beyond a reasonable doubt.

After reviewing the United States Supreme Court decisions it deemed pertinent to the issues presented, *i.e.*, *Specht v. Patterson*, 386 U.S. 605 (1967), *In re Winship*, 397 U.S. 358 (1970); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *Patterson v. New York*, 432 U.S. 197 (1977); *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), the *Krantz* court reasoned the "primary concern in these series of cases was that

states would circumvent due process by redefining the essential elements of guilt as affirmative defenses or as sentencing factors." 47 St.Rptr. at 461. The court concluded Montana's weapon enhancement statute did not go beyond the "permissible limits" of the Due Process Clause because it had neither effect. *Id.* Rather, the court, cognizant of the fact the enhancement statute was part of a statutory scheme designed to limit the discretion of sentencing courts by establishing guidelines and minimum mandatory sentences, concluded the statute simply "takes one factor traditionally used in sentencing, the use of a weapon during a crime, and dictates the minimum weight the court must assign." 47 St.Rptr. at 461. The court rejected the proposition that once an enhancement statute allows imposition of a sentence which exceeds the maximum sentence prescribed for the underlying substantive offense, the statute must be considered as creating a separate substantive offense with respect to which the accused is entitled to his full panoply of constitutional rights. 47 St.Rptr. at 460-461. In rejecting this position, the Montana Supreme Court concluded "[t]he message of *Patterson* and *McMillan* is that the decision to designate specified factors as elements of a crime, as affirmative defenses, or as sentencing factors, is fundamentally a decision left to the states." 47 St.Rptr. at 460.

The linchpin of the *Krantz* decision lies in the court's conclusion that the use of a weapon, although a finding of fact essential to imposition of a penalty under the weapon enhancement statute, is not an element essential to the finding of guilt of the underlying crime. 47 St.Rptr. 454. *Ergo*, the court reasoned, the enhancement statute

does not exceed the state's authority to pursue its fundamental right of defining the crime and prescribing punishment. 47 St.Rptr. at 460-61. The court stated its belief the "system" established by the Montana Legislature for enhancement of penalty in crimes involving the use of a weapon does not circumvent due process of law by "redefining the essential elements of guilt as affirmative defenses or as sentencing factors." 47 St.Rptr. 454.

A recapitulation of the Montana Supreme Court's interpretation of the weapon enhancement statute is a prerequisite to this court's assessment of the validity of the present petition for habeas relief, since this court is bound by the Montana Supreme Court's interpretations of Montana law. *See, Townzen v. Craven,* 444 F.2d 315, 316 (9th Cir. 1971). Cognizant of the Montana Supreme Court's holding that the weapon enhancement statute does not create a separate substantive offense but merely sets forth a legitimate factor to be considered by a trial court in imposing sentence, this court turns to address the constitutional validity of the Montana weapon enhancement statute and the application of that statute to Nichols.[4]

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[4] The constitutional validity of the Montana weapon enhancement statute passed scrutiny under the Due Process Clause in *LaMere v. Risley,* 827 F.2d 622 (9th Cir. 1987) (defendant not deprived of due process by application of Mont.Code Ann. § 46-18-221 although information did not charge violation). The validity of the statute is appropriate reassessed in light of *Adamson v. Ricketts,* 865 F.2d 1011 (9th Cir. 1988).

II.

The Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. at 364. In striking a balance between the state's power to regulate procedures under which its laws are carried out, and the right of an accused to due process of law, the Supreme Court has declared that the Due Process Clause "requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged." *Patterson v. New York*, 432 U.S. 197, 210 (1977). There are, however, obvious constitutional limits beyond which the states may not go in establishing the elements of a crime and the allocation of burden of proof with respect to each of those elements. *Patterson*, 432 U.S. at 210. Due process of law does require that a State must prove every ingredient of an offense beyond a reasonable doubt, and does not allow the State to shift the burden of proof to the defendant by presuming a necessary ingredient upon proof of the other elements of the offense. *Patterson*, 432 U.S. at 215 (*citing*, *Mullaney v. Wilbur*, 421 U.S. 684 (1975)).[5]

The Court in *Patterson* rejected the suggestion that its holding in *Mullaney* should be broadly read to mean that a "State may not permit the blameworthiness of an act or

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[5] In *Patterson*, the Court upheld that aspect of the State of New York's murder statutes which allowed for reduction of a murder conviction to manslaughter upon affirmative proof by the defendant, beyond a reasonable doubt, that he was acting under the influence of extreme emotional distress. 432 U.S. at 205.

the severity of the punishment authorized for its commission to depend on the presence or absence of an identified fact without assuming the burden of proving the presence or absence of that fact, as the case may be, beyond a reasonable doubt." 432 U.S. at 214. The Court proceeded to state:

> *Mullaney* surely held that a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense. . . . Such shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed is impermissible under the Due Process Clause.

432 U.S. at 215.[6]

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[6] A re-visitation to *Mullaney* is appropriate. There the Court held the Due Process Clause "requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case." 421 U.S. at 704. The criminal statute invalidated in *Mullaney, i.e.*, the State of Maine's murder statute, included malice as part of the definition of murder. Under the statute, a person accused of murder could rebut the statutory presumption that he committed the offense with "malice aforethought" by proving that he acted in the heat of passion on sudden provocation. The Court held the scheme improperly shifted the burden of proof from the State to the defendant in contravention of the Due Process Clause as construed in *In re Winship*, 397 U.S. 358 (1970). 421 U.S. at 703-04. The Court expressly rejected the notion that *Winship* is limited to those facts that constitute a crime as defined by state law. 421 U.S. at 698.

The Supreme Court's most recent pronouncement regarding the interplay between the Due Process Clause, as interpreted in *In re Winship*, *Mullaney* and *Patterson*, and the right of the several states to define and punish criminal conduct came in *McMillan v. Pennsylvania*, 477 U.S. 79. Under constitutional challenge in *McMillan* was Pennsylvania's mandatory minimum sentencing act, 42 Pa.Cons. Stat. § 9712 (1982), which provides, *inter alia*, that anyone convicted of certain enumerated felonies is subject to a mandatory minimum sentence of five years' imprisonment if the sentencing judge finds, by a preponderance of the evidence, that the person "visibly possessed a firearm" during the commission of the offense. 477 U.S. at 81.[7] The petitioner in *McMillan* argued that under the Due Process Clause, as interpreted in *Winship* and *Mullaney*, if a State wants to punish visible possession of a firearm it must undertake the burden of proving that fact beyond a reasonable doubt. 477 U.S. at 84. The Court, however, rejected the petitioner's argument, concluding that "States may treat 'visible possession of a firearm' as a sentencing consideration rather than an element of a particular offense." 477 U.S. at 89-90. The Court found the issue presented to have been controlled by its holding in *Patterson*. 477 U.S. at 85.

The Court in *McMillan* began its analysis, as it did in *Patterson* rejecting the suggestion that whenever a State links the "severity of punishment to the presence or absence of an identified fact" the State must prove that fact beyond a reasonable doubt. 477 U.S. at 84 (citation omitted). While acknowledging the existence of constitutional limits beyond which the States may not go in defining the elements of a criminal offense, the Court

stated: "*Patterson* stressed that in determining what facts must be proved beyond a reasonable doubt, the State Legislature's definition of the elements of the offense is usually dispositive. . . . " 477 U.S. at 85. The Court did not see the Pennsylvania act as creating the sort of presumption of guilt condemned in *Patterson (citing McFarlane v. American Sugar Refining Co.*, 241 U.S. 79 (1916); *Tot v. United States*, 319 U.S. 463 (1943)). 477 U.S. at 87. Nor did the Act, the Court concluded, operate to relieve the prosecution of its burden of proving guilt, but under its express terms, becomes applicable only after defendant has been duly convicted of a crime for which he is to be punished. *Id.*

Critical to the rationale expressed in *McMillan*, was the fact the enhancement statute "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm." 477 U.S. at 88.[8] The Court emphasized that the

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[7] The pertinent provisions of the Pennsylvania act direct the trial judge to consider, at the time of sentencing, the evidence introduced at trial and any additional evidence offered by either the defendant or the State. The act operates to divest the judge of discretion to impose any sentence of less than five years for the underlying felony, but it does not authorize a sentence in excess of that otherwise allowed for the underlying offense. 477 U.S. at 82.

[8] The *McMillan* Court expressly recognized that the petitioner's claim "that visible possession under the Pennsylvania statute is 'really' an element of the offense for which they are

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Pennsylvania Legislature, in its passage of the Act, did not change the definition of any existing offense but simply took one factor which has traditionally been considered by sentencing courts to bear on punishment, i.e., the instrumentality used in committing a violent felony, and dictated the precise weight to be given that factor if the instrumentality is a firearm. 477 U.S. at 89-90. While the Court sustained the constitutional validity of Pennsylvania's mandatory minimum sentencing act, the Court quickly cautioned that it was not attempting to lay down. any "bright line" test, leaving the constitutionality of similar statutes to depend on "differences of degree". 477 U.S. at 91.[9]

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being punished that Pennsylvania has in effect defined a new set of upgraded felonies – would have at least more superficial appeal if the finding of visible possession exposed them to greater or additional punishment. . . . " 477 U.S. at 88. The Court chose not to elaborate.

[9] The five-four majority opinion was the subject of a spirited dissent from Justice Stevens. 477 U.S. at 95-105. Concerned that the importance of the reasonable doubt standard, and the Constitution itself, would be demeaned if the substance of the standard could be avoided by nothing more than a legislative declaration that prohibited conduct is not an "element" of a crime, Justice Stevens stated:

> "Appropriate respect for the rule of *In re Winship* requires that there be some constitutional limits on the power of a state to define the elements of criminal offenses. The high standard of proof is required because of the immense importance of the individual interest in avoiding both the loss of liberty and the stigma that results from a criminal conviction. It

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The *McMillan* Court's broad statement that "[s]tates may treat 'visible possession of a firearm' as a sentencing consideration rather than an element of a particular offense . . . ", the State of Montana submits, is dispositive of Nichols' claim. The State, of course, views it to be entirely within the prerogative of the several states to determine whether a particular factor is to be deemed a sentencing consideration as opposed to an element of a particular offense. It is urged by Nichols, however, that *McMillan* may be distinguished since Pennsylvania's mandatory minimum sentencing act serves only to limit the sentencing judge's discretion, and unlike Montana's weapon enhancement statute, does not operate to increase the maximum penalty permitted for the underlying offense. This distinction, Nichols urges, compels the conclusion the particular factor which brings the enhancement statute into play, *i.e.*, knowing possession of a weapon, must be charged and proved beyond a reasonable doubt. Nichols implores the court to recognize that the Montana weapon enhancement statute serves, in effect, to define a set of "aggravated" felonies.

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> follows, I submit, if a State provides that a specific component of a prohibited transaction shall give rise both to a special stigma and to a special punishment, that component must be treated as a 'fact necessary to constitute the crime' within the meaning of our holding in *In re Winship*."

477 U.S. at 79. In his opinion, "[n]othing in *Patterson* or any of its predecessors authorizes a State to decide for itself which of the ingredients of the prohibited transaction are 'elements' that it must prove beyond a reasonable doubt at trial." 477 U.S. at 98.

The difference between Montana's weapon enhancement statute and Pennsylvania's mandatory minimum sentencing act, challenged in *McMillan*, is obvious. Montana's statute operates to alter the maximum penalty for the crime committed, as opposed to simply limiting the sentencing court's discretion. The statute increases the maximum penalties, as otherwise prescribed for all felonies, by ten years. The court must decide whether this statutory scheme comports with the due process requirement, as defined in *In re Winship*, that the prosecution prove beyond a reasonable doubt "every fact necessary to constitute the crime charged." *In re Winship*, 397 U.S. at 364.

The *McMillan* Court expressly recognized that states "may treat 'visible possession of a firearm' as a sentencing consideration rather than an element of a particular offense. . . . " 477 U.S. at 91. Although the Court suggested that a statutory scheme like Montana's, which serves to create a set of "upgraded felonies" might be subjected to closer scrutiny, the Court stopped short of reaching this conclusion. 477 U.S. at 88. The Court further viewed as insignificant to due process analysis, the fact some states have chosen to make possession of a weapon an element of various aggravated offenses: "[t]he fact that the States have formulated different statutory schemes to punish armed felons is merely a reflection of our federal system which demands '[t]olerance for a spectrum of State procedures dealing with a common problem of law enforcement.' *Spencer v. Texas*, 385 U.S. 554, 566 (1967)." 477 U.S. at 90. Contrary to the assertion of Nichols, the fact the Montana scheme operates to increase the sentencing

range for felonies, as opposed to merely limiting the sentencing court's discretion, does not compel the conclusion the statute contravenes the Due Process Clause under the rationale of *McMillan*.

The Court in *McMillan*, as it had in *Patterson*, rejected the claim that "whenever a State links the 'severity of punishment' to the 'presence or absence of an identified fact', the State must prove that fact beyond a reasonable doubt." 477 U.S. at 84 (citation omitted). This major premise established, the Court proceeded to develop an analytical framework for determining what facts constitute the elements of an offense and, accordingly, must be proved beyond a reasonable doubt. First, all the elements included in the definition of the offense, as established by state law, must be proven beyond a reasonable doubt. 477 U.S. at 85. Second, the definition adopted by a state cannot be designed to "evade" the commands of *Winship*. 477 U.S. at 89. The latter inquiry, of course, entails an analysis which proceeds beyond the face of the challenged statute to a determination of whether the reasonable-doubt requirement "applies to facts not formally identified as elements of the offense charged." 477 U.S. at 86.[10]

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[10] Although framed by the *McMillan* court as two distinct inquiries, it would seem, as a practical matter, the inquiries meld into one, *i.e.*, whether the identified fact which bears upon the severity of punishment is one which due process of law requires to be proven beyond a reasonable doubt. The state legislature defines the offense that is charged in any given case. A federal habeas court in turn is bound by state court interpretations of that statute. *Townzen v. Craven*, 444 F.2d 315,

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The decision of the Montana Supreme Court in *Krantz* establishes the Montana statutory plan was not intended by the Legislature to make possession of a weapon an element of the underlying offense, in Nichols' case kidnapping, which must be proved beyond a reasonable doubt. 47 St.Rptr. at 461-62.[11] Under the relevant state law the identified fact, *i.e.*, possession of a weapon, is not essential to establish criminality in the first instance. 47 St.Rptr. at 461. Thus, the issue presented reduces to whether, under a due process analysis, possession of a firearm constituted a fact necessary to constitute the crime for which Nichols was convicted. *See, In re Winship*, 397 U.S. at 364.[12]

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316 (9th Cir. 1971). In view of the exhaustion requirement attendant habeas proceedings under 28 U.S.C. § 2254, the challenged statute will, in most instances, as in the case at bar, have withstood constitutional challenge in the state courts. *See*, 28 U.S.C. § 2254(b).

[11] A reading of Mont.Code Ann. § 46-18-221 would indicate otherwise; a conclusion reached by the dissent in *Krantz*. 47 St.Rptr. at 464-66 (Sheehy, J., dissenting).

[12] There exists no indication Montana restructured its criminal code and concomitant penalty structure in an attempt to "evade" the commands of *Winship*, a specter of concern underlying the Court's rationale in *Winship* and *Mullaney*. *See, Mullaney*, 421 U.S. at 698. The Montana Legislature adopted the weapon enhancement statute as part of a bill intended to limit the discretion of sentencing courts. *State v. Krantz, supra*, 47 St.Rptr. at 461. No claim is made, nor is the court aware, that a revision of the substantive criminal statutes occurred contemporaneously with the enactment of the enhancement scheme. *Id.*

The Montana enhancement scheme goes one step beyond the Pennsylvania scheme scrutinized by the Court in *McMillan*, linking the available range of sentence to the existence of an identified fact. As noted, Nichols urges this distinction results in Montana's scheme exceeding the constitutional limit envisioned, yet not precisely defined, by the Court in *Patterson* and *McMillan*. *See, McMillan*, 477 U.S. at 86; *cf., Adamson v. Ricketts*, 865 F.2d 1011, 1024 (9th Cir. 1988). The court disagrees.

Support for Nichols' position is arguably provided by the Ninth Circuit Court of Appeals' decision in *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988). Under constitutional scrutiny by the *en banc* court in *Adamson* was Arizona's death penalty statute, Ariz.Stat. § 13-703. Section 13-703 delegated the responsibility for deciding whether a defendant would receive a life sentence or death to the judge who presided over a separate, statutorily mandated, aggravation-mitigation hearing. 865 F.2d at 1024-1025. Adamson challenged this statutory scheme as violative of the Due Process Clause of the fourteenth amendment, contending the scheme operated to deprive him of his fundamental right to a jury trial. 865 F.2d at 1025.

Upon examination of the scheme, the *Adamson* court concluded the "aggravating circumstances", the existence of which were essential to imposition of the death penalty, are "additional *elements*" necessary for finding that a defendant is guilty of the distinctive offense of *capital* murder." 865 F.2d at 1925-1026 (emphasis in original). The court viewed as compelling the fact the "aggravating circumstance", with its attendant burden of proof, *i.e.*, beyond a reasonable doubt, mirrored "the attributes of an

essential element of the offense during the guilt phase of a trial." 865 at 1026. Likewise, the subjective inquiry into the defendant's state of mind which the statutory scheme required, entailed a factual assessment traditionally within the jury's domain of decision. 865 at 1026-1027.[13]

The *Adamson* court found *McMillan* provided additional support for its conclusion. 865 F.2d at 1027. Of import to the present analysis is the significance the *Adamson* court attributed to the "emphasis" placed by the Court in *McMillan* and the fact the Pennsylvania statute did not operate to alter the sentencing range already available to the trial court. 865 F.2d at 1027-1028. Because the finding of aggravating circumstances exposed the defendant to greater or additional punishment under the Arizona scheme, the *Adamson* court concluded the finding must be afforded the status of an "element" of a capital offense. *Id.*

I am unpersuaded that *Adamson* controls disposition of the issue *sub judice*. The court's conclusions in *Adamson* cannot be divorced from the historical considerations assessed by the court in striking down the Arizona statutory scheme. The "revised" statutory scheme, the court observed, "*withdrew* from the definition of its homicide crimes various 'elements' traditionally preserved in Arizona for jury determination and reclassified them as judicial sentencing circumstances." 865 F.2d at 1027.

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[13] The *Adamson* court employed, in essence, the historical test advanced by the *Patterson* dissent, 432 U.S. at 216 (Powell, J., dissenting), and alluded to by the Court in *McMillan*. 477 U.S. at 90.

(emphasis in original). "The confluence of the elements and circumstances, combined with the simultaneous repeal of the statute allocating the burden of proving mitigation at trial and enactment of the statute allocating this burden at judicial sentencing, distinguishes Arizona's scheme from the one in McMillan." 865 F.2d at 1027. Unlike the Arizona statutory scheme addressed in *Adamson*, Montana's sentence enhancement scheme was not part of a revision of the substantive criminal statutes which operated to withdraw particular "elements" of substantive crimes traditionally preserved for determination by a jury, and simply classify those elements as sentencing considerations. *See, Krantz, supra*, 47 St.Rptr. at 462.[14]

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[14] The *Adamson* court observed: "[T]he parameters of what an 'element' – so as to fall within the jury's factfinding responsibilities – remain elusive. A line of due process cases considering such contours has failed to produce concrete guidelines." 865 F.2d at 1024. *Adamson*, the present case, and *McMillan* itself, poignantly exemplify the difficulty of establishing discernible contours for determining when state criminal legislation crosses the permissible constitutional line.

In taking issue with the *McMillan* majority, Justice Stevens urged the majority to recognize the "purposive" approach adopted by the Court in *In re Winship* in attempting to define the precise contours of the Due Process Clause. 477 U.S. at 98 (Stevens, J., dissenting). The distinction between aggravating and mitigating facts, he observed, plays a vital role in maintaining the integrity of the Constitution, in particular the Due Process Clause. 477 U.S. at 100-103.

One would have to believe Justice Stevens envisioned the dilemma the more nebulous standard adopted by the *McMillan* majority would create in its application.

Any distinction drawn between the Pennsylvania scheme and the Montana scheme, I believe, would prove illusory, in view of the adjudication of the Due Process Clause rendered by the majority opinion in *McMillan*.[15]

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[15] I am compelled to note my agreement with the dissenting opinions expressed by Justice Powell in *Patterson*, 432 U.S. at 216-232, and Justice Stevens in *McMillan*, 477 U.S. at 95-104. While it is uncontroverted that it is the State's business to define criminal conduct and prescribe appropriate penalties, "nothing in *Patterson* or any of its predecessors authorizes a State to decide for itself which of the ingredients of the prohibited transaction are 'elements' that it must prove beyond a reasonable doubt at trial." *McMillan*, 477 U.S. at 98 (Stevens, J., dissenting). "A state legislature may not dispense with the requirement of proof beyond a reasonable doubt for conduct that it targets for severe criminal penalties. . . . The Due Process Clause requires it to prove any component of the prohibited transaction that gives rise to both a special stigma and special punishment beyond a reasonable doubt. This much has been evident at least since *In re Winship*, 397 U.S. 358 (1970)." *Id.* at 96.

I believe the Due Process Clause, as interpreted by the *In re Winship* court, requires possession of a firearm, under the Montana scheme, to be considered an element of a criminal offense to which the proof beyond a reasonable doubt requirement applies. My opinion, however, does not constitute the supreme law of the land. The interpretation of the Due Process Clause, as embodied in the Supreme Court's decision in *McMillan*, constitutes the controlling law in this case. Any change or clarification of that law must emanate from the Supreme Court. In that regard, Justice Powell expressed his confidence that the Court would, even under the formalistic approach of constitutional adjudication adopted in *Patterson*, "find some way" to strike down a formalistically correct yet egregious statute. 432 U.S. at 225 n.9. Yet, as he correctly

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The procedural requirements that states must meet to comply with the mandate of the Due Process Clause are not amorphous in nature, left to be defined by the legislation of a particular state. *See, McMillan,* 477 U.S. at 93 (Marshall, J., dissenting). This principle is the very bedrock of the *Winship/Mullaney* rationale, which requires a due process analysis that looks to the "operation and effect of the law as applied." *Mullaney,* 421 U.S. at 699 (*citing, St. Louis S.W.R. Co. v. Arkansas,* 235 U.S. 350, 362 (1914)). In that vein, once a state defines a criminal offense, "the Due Process Clause requires it to prove any component of the prohibited transaction that gives rise to both a special stigma and a special punishment beyond a reasonable doubt." *McMillan,* 477 U.S. at 96 (Stevens, J., dissenting). The clear import of *McMillan* lies in the Court's recognition that possession of a weapon, while a factor which bears upon the severity of punishment, is not an "element" of a criminal offense which due process of law requires to be proven beyond a reasonable doubt. 477 U.S. at 89-91. A state's decision to dictate that a factor traditionally considered by sentencing courts to bear on punishment – use of a weapon in committing a felony – does not "transfor[m] against its will a sentencing factor into an 'element' of some hypothetical 'offense'." 477 U.S. at 89-90. In view of the rationale employed by the Court

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observed, the approach adopted in *Patterson,* and carried on in *McMillan,* fails to establish a "conceptual framework for distinguishing abuses from legitimate legislative adjustments" in defining crime in the concomitant burden of persuasion. *Id.*

in *McMillan*, I am unable to perceive how the "due process calculus" would change based upon the statutory methodology utilized by a legislature in dictating that possession of a weapon is to be considered in passing sentence for a criminal offense. 477 U.S. at 92.[16]

Therefore, the court holds the Montana weapon enhancement statute, Mont.Code Ann. § 46-18-221 (1985), is not violative of the Due Process Clause of the fourteenth amendment either on its face, or as applied to the petitioner Dan Nichols.

The conclusion that the possession of a weapon does not constitute an element of the substantive crime of kidnapping with which Nichols was charged is determinative of the remainder of the constitutional challenge Nichols advances. Therefore,

IT IS HEREBY ORDERED that the present petition for habeas corpus relief, pursuant to 28 U.S.C. § 2254, be, and the same hereby is, DENIED.

The Clerk shall enter JUDGMENT accordingly, and notify the parties as to the entry thereof.

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[16] Recognition of the fact the procedural mandate of the Due Process Clause does not depend upon the legislative enactment of a particular state compels this court to conclude that Montana's weapon enhancement statute falls on the permissible side of the constitutional line. Ironically enough, recognition of this fact prompted the dissents in both *Patterson* and *McMillan*.

DATED this 3 day of May, 1990.

/s/ Paul G. Hatfield
PAUL G. HATFIELD,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

(3)

Supreme Court, U.S.
FILED
SEP 7
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-2004

In The

Supreme Court of the United States

October Term, 1989

THOMAS F. KRANTZ,
Petitioner,

vs.

THE STATE OF MONTANA,
Respondent.

On Petition For a Writ of Certiorari
To The Montana Supreme Court

REPLY TO THE BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Arizona Revised Statutes Annotated, Section 13-703(A): Sentence of death or life imprisonment without possibility of release until the defendant has served a prescribed period of time; aggravating and mitigating circumstances.

A. A person guilty of first degree murder as defined in §13-1105 shall suffer death or imprisonment in the custody of the state department of corrections for life, without possibility of release on any basis until the completion of the service of twenty-five calendar years if the victim was fifteen or more years of age and thirty-five years if the victim was under fifteen years of age, as determined and in accordance with the procedures provided in subsections B through G of this section.

STATEMENT OF THE CASE

In its statement of the case, the State notes that the Montana Supreme Court found that Petitioner Krantz received actual notice that the use of a weapon would be considered during sentencing, and held that failure to allege weapon use in the Information was harmless error. What it fails to point out, however, is that the Montana Court made the harmless error determination only in the context of considering what notice must be provided a convicted defendant of the issues that will be arise at his sentencing. It specifically held, reaffirming its previous decisions, that the weapon enhancement statute does not create a separate crime or element of a crime. (Pet. App. A at 14a). As a consequence, the Court did not find that the failure to submit the issue of weapon usage to the jury for a factual determination was error, harmless or otherwise.

The State's second assertion, that the Montana Court found that the weapon enhancement statute contained elements "similar to those found in substantive criminal

statutes" but also required elements "not necessary to establish guilt of the underlying crime," is exactly the point of the petition for a writ of certiorari. Petitioner Krantz is asking this Court to decide whether a state may, consistent with the Sixth Amendment and the Due Process Clause of the United States Constitution, impose a separate, consecutive term of incarceration—ten years in this case—based solely upon a factor not charged or submitted to the jury for a factual determination.

ARGUMENT

I. Petitioner Krantz Has Standing To Raise The Issues Presented In The Petition, And They Are Ripe For Review By This Court.

The State first appears to argue that Petitioner Krantz may not have standing because the Montana Supreme Court addressed the standing question in relation to both Montana's weapon enhancement statute and its dangerous offender statute. The State suggests that the Montana Court may have found standing only in regard to the dangerous offender statute. That contention is belied, however, by this statement in the Montana Court's opinion: "The State argues that because the appellant's sentence, including enhancement, did not exceed the maximum possible sentences for robbery and accountability, the appellant suffered no injury. We disagree with the State and hold that the appellant has standing to challenge both the weapon enhancement statute and the dangerous offender statute." (Pet. App. A at 6a). Further, Petitioner Krantz did not raise the issues presented here in relation to the dangerous offender statute; the Montana Court addressed that question sua sponte.

The State next argues that because Petitioner Krantz's total sentence, including enhancement, did not exceed the maximum possible for the two felonies of which he was convicted, Montana has not construed its weapon enhancement provision in a way that conflicts with the

federal constitution, and the issue is not ripe for review by this Court. This argument disregards the fact that the total length of Petitioner Krantz's sentence did not figure, in the least, in the Montana Supreme Court's determination that application of the weapon enhancement statute, absent notice in the charging document and a jury determination on the relevant issue, did not violate the federal constitution.

Any argument that Petitioner Krantz has not been injured by the sentence for weapon enhancement, or that the total length of the sentences actually imposed controls the constitutional issues, is specious. The provisions of the weapon statute itself mandate that the sentence for weapon use must be separate from the sentence for the underlying offense. Section 46-18-221(1) MCA provides: "A person who...while engaged in the commission of an offense...used a dangerous weapon shall, *in addition to the punishment provided for the commission of such offense* be sentenced to a term of imprisonment...of not less than 2 years or more than 10 years." (emphasis supplied). Of even greater significance is §46-18-221(4), which requires the sentence for weapon use to be consecutive to the sentence imposed for the underlying offense. In any case where the weapon statute is invoked it is thus *inevitable* that a defendant will suffer concrete injury above and beyond whatever penalty he suffers for the principal offense.

Also important are the implications of the recidivist portions of the statute. Section 46-18-221(2) provides for increased penalties for subsequent "convictions" for weapon use. It provides:

> A person convicted of a *second or subsequent offense under this section* shall, in addition to the punishment provided for the commission of the present offense, be sentenced to a term of imprisonment in the state prison of not less than 4 years or more than 20 years... (emphasis supplied).

Obviously, this section creates the potential that the

impact of receiving a sentence for weapon use will go beyond the case in which it was imposed.

There are three components of the sentence imposed on Petitioner Krantz: 1) 30 years for robbery, 2) 30 years for accountability for robbery, (these two portions of the sentence to run concurrently) and 3) a *separate, consecutive* sentence of 10 years for the use of a weapon during the offense of robbery.[1] Because the sentence for weapon use is necessarily separate from, and consecutive to, the sentence for the underlying offense, and because adverse collateral consequences may flow from the weapon enhancement sentence, it is reviewable on its own merits. This conclusion is all the more evident if one considers the rule that convictions resulting in concurrent sentences may be challenged independently of each other. *See eg, Benton v. Maryland*, 395 U.S. 784 (1969); *United States v. DeBright*, 730 F.2d 1255 (9th Cir. 1984); *United States v. Burt*, 516 F.2d 873 (7th Cir. 1975); *See, generally*, 3 LaFave and Israel, Criminal Procedure §26.5(b). In those situations, the total sentence to be served is, by definition, within the possible maximum for the offenses of which the defendant was convicted and the liberty interests at stake are far less substantial than in this case.

II. This Court's Precedent, Specifically The Recent Decision In *Walton v. Arizona*, Supports The Position Urged By Petitioner Krantz.

Montana argues that states have absolute power to punish particular acts by designating them either as crimes or as sentencing considerations, and therefore, simply because the Montana Supreme Court has deter-

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[1] As was noted in footnote 6 of the petition for a writ of certiorari, the enhancement pursuant to the weapon statute was itself enhanced by Mr. Krantz's designation as a dangerous offender, which effectively doubles the time he will actually serve in prison under the weapon enhancement portion of his sentence from 2-1/2 to 5 years, less good time (if he receives a parole).

mined that the Montana legislature intended weapon use to be a sentencing consideration, a separate, consecutive sentence for weapon use may constitutionally be imposed, absent an allegation of weapon use in the charging document and a jury determination on that issue.[2] Contrary to the position urged by Montana, however, states do not have absolute power in this regard, otherwise the cases of *Specht v. Patterson*, 386 U.S. 605 (1967) and *Mullaney v. Wilbur*, 421 U.S. 684 (1975) would not have determined that statutes that increase the possible term of incarceration based on separate acts outside the charge, or provide for separate terms of incarceration, cannot be applied absent full trial procedures. The "operation and effect of the law as applied and enforced by the State," rather than merely its formal designation as a sentencing factor, is controlling. *Mullaney*, 421 U.S. at 699.[3]

The State, in it's Brief, attempts to gloss over the differences between Montana's weapon statute and the statute found constitutional in *McMillan v. Pennsylvania*,

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[2] Interestingly, the United States District Court for the District of Montana recently noted that a fair reading of §46-18-221 MCA indicates that the legislature intended weapon use to be treated as a separate offense not a sentencing consideration. (Brief in Opp. App. at 17, footnote 11).

[3] In *Nichols v. McCormick*, No. CV-89-028-BU-PGH (D. Mont. May 4, 1990), the Federal District Court for the District of Montana, like the Montana Supreme Court, concluded that the legislative history of a statute determines its constitutionality under *McMillan*. That decision, like the decision of the Montana Supreme Court, however, fails to give proper effect to the major premise of the decisions in *In re Winship*, 397 U.S. 358 (1970), *Specht*, and *Mullaney:* that there are "obvious" limits beyond which a state may not go in this regard. [Interestingly, in *Nichols*, Judge Hatfield noted his personal agreement with the positions advanced by the petitioner there—and here—but felt constrained by his reading of *McMillan* to uphold the statute, because there was no evidence in it of a recent legislative attempt to reallocate the burdens of proof by redefining traditional crimes. (Brief in Opp. App. at 21, footnote 15)].

477 U.S. 79 (1986) by stating: "The Pennsylvania statute imposed a mandatory minimum period of incarceration, as does Montana's." (Brief in Opp. at 8). This statement is disingenuous in the extreme. The Pennsylvania statute requires the imposition of a mandatory minimum sentence *within* the term already provided for the underlying offense, if the sentencing court finds that a weapon was used. By contrast, the Montana weapon statute mandates the imposition of a *separate, consecutive* two to ten year term of incarceration, that may not be suspended, if the sentencing judge finds that a weapon was used in the underlying offense. The Montana statute imposes a possible loss of liberty on a defendant that automatically extends beyond the maximum possible loss of liberty to which he is subject, based on the crime charged.

The State, in its Brief, also offers the traditional misinterpretation of *Specht v. Patterson*, 386 U.S. 605 (1967) and implies that the case does not stand for the proposition that separate acts giving rise to separate punishments must be charged and proved beyond a reasonable doubt to a jury. That misinterpretation need not detain us.[4] What is important to recognize about *Specht*, however, is that it invalidates the theory that a legislature can only offend the due process clause in this area by redefining traditional crimes in an attempt to reallocate burdens of proof. [5] In *Specht* the legislature had made no such attempt. It had simply—and unconstitutionally—attached additional penalties for uncharged acts to the liability for established crimes, with no requirement that the other acts be charged or proved. *Specht* is thus indistinguishable from this case.

The State also asserts that *Walton v. Arizona*, 110 S.Ct. 3047, 58 U.S.L.W. 4992 (1990), controls the outcome here. That case involved sentencing for first-degree murder, where the sentencing statute provided either for life im-

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[4] It is fully discussed in the Petition at p. 21.

[5] *See*, the discussion of this theory in *Nichols, supra*, footnote 3.

prisonment or the death penalty. The choice between the two possible sentences was guided by a judicial determination, based on evidence presented at a separate sentencing hearing, of the existence of statutorily enumerated aggravating and mitigating factors. This Court rejected Walton's contention that the sentencing scheme was constitutionally infirm because every finding of fact underlying the sentencing decision was not made by the jury.

Walton, however, does not control the issues raised by Petitioner Krantz in his petition for a writ of certiorari—at least not in the sense the state suggests. As noted above, the sentencing scheme considered in *Walton* provided that upon conviction for first-degree murder, a criminal defendant could be sentenced either to life imprisonment or death. Unlike the finding of weapon use in Montana's sentencing scheme, the finding of aggravating circumstances in *Walton* did not permit the imposition of a sentence outside of the range otherwise provided for the offense. This Court relied on that fact in upholding Arizona's sentencing provision, and noted additionally that the finding of a particular aggravating circumstance did not require that the death penalty be imposed, and that the failure to find a particular aggravating circumstance did not preclude the imposition of the death penalty.

Although the *Walton* opinion does not even mention *McMillan*, the statutes at issue in those two cases are analogous because neither adds a separate punishment beyond that provided for the offenses committed, and both guide the trial court in selecting among the sentences already available to it. In fact, in one sense, the Arizona death penalty statute at issue in *Walton* is less restrictive than the weapon statute at issue in *McMillan* because, as noted above, the finding of a particular aggravating circumstance did not mandate the imposition of the death penalty, whereas in *McMillan* the finding of weapon use mandated the imposition of a particular minimum sentence.

Another death penalty case, *Hildwin v. Florida*, 490 U.S. ___ , 105 S.Ct. 2055 (1989), does mention *McMillan*. In

Hildwin, this Court considered Florida's sentencing scheme for first degree murder which, like Arizona's, provided for a sentence of either life imprisonment or death. It was noted that the doctrine enunciated in *McMillan* did not require jury fact-finding under Florida's scheme, because the determination that an aggravating factor existed "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it." *Hildwin*, 490 U.S. at _, 105 S.Ct. at 2057, *quoting McMillan*, 477 U.S. at 87-88 (1986). Clearly, these very recent decisions support, rather than undermine, the position urged by Petitioner Krantz, that sentencing schemes providing for a separate or additional punishment necessitate greater constitutional protections than schemes that merely dictate the choice of a sentence within the range otherwise provided for the offense.

CONCLUSION

For the reasons presented above, in addition to the reasons presented in the petition itself, certiorari should be granted.

Respectfully Submitted,

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